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No. 930

In the United States Court of Appeals

For the Third Circuit

No. 12,276

UNITED STATES OF AMERICA

vs.

ERNEST T. WALDIN,

Appellant

Appeal from the Judgment and Sentence of the United States District Court for the Eastern District of Pennsylvania at Criminal No. 18512.

APPELLANT'S APPENDIX

BENJAMIN R. DONOLOW,
Attorney for Appellant.

1127 Land Title Bldg.,
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TABLE OF CONTENTS

Brief:	Page
Statement of Questions Involved	1
Statement of the Case	2
Argument:	
1. The indictment should have been dismissed because it did not properly allege an offense against the United States	7
2. The Court erred in denying appellant's motion for judgment of acquittal made at the conclusion of the Government's evidence and at the conclusion of the case because the Government failed to prove the necessary elements of the crime charged	8
3. The Court's explanation to the jury as to the meaning of the phrase "Every officer or agent appointed and acting under the authority of any revenue law of the United States. . . ." was erroneous	8
4. The Court erred in refusing appellant's point for charge No. 9, directed to the question of the necessary elements and proof of the crime charged	8
5. The Court erred in permitting cross-examination of appellant and argument to the jury by the United States Attorney as to whether Dr. Mogavero knew appellant was an employee of the Internal Revenue since the point was res judicata	23
6. The meaning of the words: "Every officer or agent appointed and acting under the authority of any revenue law" is res judicata	26

7. The Court erred in refusing appellant's point for charge No. 4, directed to the question of entrapment 27

8. The Court erred in refusing appellant's motion to strike all testimony relative to the money, the package and the list, none of which were in evidence 30

Conclusion 32

APPENDIX:

I. Relevant Docket Entries 1a

II. Indictment 3a

III. Opinion (Lord, J.) 9a

Order 19a

IV. Testimony:

GOVERNMENT'S EVIDENCE

	DIR.	CR.	RED.	REC.
Anthony De Virgilis	20a	21a		
Albert S. Herskowitz	24a	32a		
Edward A. Hill	46a	54a	56a	
Daniel L. Tucker	57a	68a	73a	73a
Miriam B. Mogavero	74a	80a		
Joseph DiMaggio	85a	95a	99a	

DEFENDANT'S EVIDENCE

Ernest T. Waldin	100a	120a	141a	

V. Charge of the Court 142a

VI. United States Attorney's Argument to Jury 144a

VII. Opinion (Grim, J.) 146a

Order 152a

VIII. Sentence of the Court 153a

TABLE OF CITATIONS

CASES:

Butts v. U. S., 273 F. 35 (1921) . . . 30

Felder v. U. S., 9 F. 2d 872 (1925) . . . 20, 21

Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915) . . . 24, 27

Glasser v. U. S., 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) . . . 26

Hurley v. U. S., 192 F. 2d 297 (1951) . . . 10

Lonabaugh v. U. S., 179 F. 476 (1910) . . . 17

Newman v. U. S., 299 F. 128 (1924) . . . 30

Purcell v. U. S., 104 F. Supp. 110 (1951) . . . 10

Sealfon v. U. S., 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 180 (1948) . . . 24

Terry v. U. S., 7 F. 2d 28 (1925) . . . 20

Turinetti v. U. S., 2 F. 2d 15 (1924) . . . 23

U. S. v. Clark, 121 F. 190 (1903) . . . 17, 18

U. S. v. DeAngelo, 138 F. 2d 466 (1943) . . . 24, 27

U. S. v. Gerdel, 103 F. Supp. 635 (1952) . . . 12, 13

U. S. v. Milner, 36 F. 890 (1888) . . . 22

U. S. v. Tanz, 136 F. Supp. 404 (1955) . . . 8

U. S. v. Teed, 185 F. 2d 561 (1950) . . . 17, 18

U. S. v. Waldin, 138 F. Supp. 791 . . . 10

U. S. Waldin, 139 F. Supp. 156 . . . 12, 24

U. S. Williams, 341 U.S. 70, 71 S. Ct. 581, 95 L. Ed. 758 (1951) . . . 10

U. S. v. Witt, 215 F. 2d 580 (1954) . . . 13

Watson v. U. S., 224 F. 2d 910 (1955) . . . 31

STATUTE:

26 U.S.C. 4047 (e) (I.R.C. 1939) 53 Stat. 496, amended June 25, 1948, c.646, §1, 62 Stat. 909 . . . 7, 8, 9, 10, 11, 13, 23, 26, 32

APPELLANT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal Nos. 18412 and 18512

United States of America

vs.

Ernest T. Waldin

I.
RELEVANT DOCKET ENTRIES

1955

9/20, True Bill.

10/13, Motion and Order for Bench Warrant, filed. Warrant exct. Van Dusen.

10/18, Agreement of Defendant and Surety to extend bond filed in Criminal No. 18412 to cover the bond required in this case, filed.

11/9, Warrant returned: "On 10/18/55 executed" and filed.

1956

1/5, Defendant's motion to dismiss indictment filed. (See No. 18412)

Docket Entries

1/27, Hearing sur motion to dismiss indictment and motion to amend indictment. CAV. Lord

2/16, Opinion, Lord, J., denying motion to dismiss filed. (See No. 18412)

9/24, Jury called and Sworn, Grim.

9/24, Trial—Witnesses Sworn, Grim.

9/25, Trial resumed, Grim.

9/26, Trial concluded, Grim.

9/26, Verdict: Guilty, Grim.

9/26, Government's points for charge filed. (See No. 18412)

9/26, Defendant's points for charge filed.

9/[illegible] Defendant's motion for judgment of acquittal or in the alternative for a new trial filed.

1957

2/14, Hearing sur motion for judgment of acquittal and for a new trial. CAV. Grim.

2/18, Testimony filed. (1 vol.)

2/18, Transcript of Closing Argument of Mr. Swotes filed.

4/9, Opinion, Grim, J., and Order denying Defendant's motions for new trial and for judgment of acquittal, filed. 4/10/57 Noted and Notice Mailed. Grim.

4/29, Transcript of sentence filed. Grim.

4/29, Sentence: Impr. for 2 years. Grim.

5/3, Defendant's notice of appeal filed (Copy to G. Clinton Fogwell).

5/3, Copy of Clerk's Statement of Docket Entries filed.

5/8, Judgment and Commitment filed.

II.
INDICTMENT

The Grand Jury Charges:

(1) That from on or about April 20, 1949 and continuously thereafter up to and including October 7, 1949, in the Eastern District of Pennsylvania and elsewhere, ERNEST T. WALDIN, the defendant herein, and divers other persons whose true identity is to the Grand Jury unknown, co-conspirators but not named as defendants herein because their names are unknown to the Grand Jury, did wilfully, knowingly, unlawfully and feloniously conspire with each other to commit offenses against the United States, to wit: wilfully to attempt to defeat and evade a large part of the income taxes then due and owing to the United States by one Francesco Mogavera, in violation of Title 26 U.S.C., Section 145(b), and of Title 18 U.S.C., Section 371, and to defraud the United States

(a) of and concerning its rights to have its Governmental function of administering the Internal Revenue Laws, particularly the function of investigating and determining income taxes due to the United States, the function of collecting such income taxes and the function of determining whether or not to recommend criminal prosecution for violation of Internal Revenue Laws, administered and decided free from bias, interest and improper influences,

(b) of and concerning its right to the conscientious, faithful, disinterested, unbiased, and honest services, actions and judgments of the officers and employees

of the Bureau of Internal Revenue and its right to have such services, actions, and judgments of said officers and employees exercised free from corruption, partiality, improper influence, bribery and dishonest,

(c) of and concerning its right to have the income taxes of the said Francesco Mogavero investigated, determined and collected free from corrupt, improper, and dishonest interference on the part of said defendant, ERNEST T. WALDIN, and the co-conspirators, and

(d) of and concerning its right to have the defendant, ERNEST. T. WALDIN, conduct himself as a Zone Deputy Collector of Internal Revenue in an honest, fair, faithful and unbiased manner without improper and dishonest approaches, demands and offers, to any taxpayer of improper and corrupt help and assistance for the purpose of defeating and evading the proper administration of the Internal Revenue Laws, in violation of Title 26 U.S.C., Section 4047(Q)(4).

2. During the course of the conspiracy, defendant, ERNEST T. WALDIN, was an officer and employee of the Bureau of Internal Revenue of the Treasury Department duly appointed and acting under the authority of the Revenue Laws of the United States, to wit, a Zone Deputy Collector of Internal Revenue, stationed at Philadelphia, Pennsylvania.

(3) During the course of the conspiracy the income tax liability of the said Francesco Mogavero for the calendar years 1942, 1943, 1944, 1945, 1946 and 1947 was being investigated by the Bureau of Internal Revenue.

(4) It was a part of the conspiracy that the defendant and his co-conspirators would attempt to arouse

fears of criminal prosecution and assessment of additional taxes in the said Francesco Mogavero by statements to him and to his attorney, Albert Herskowitz, to the effect that the said Francesco Mogavero was threatened with criminal prosecution and assessment of additional taxes as a result of the aforesaid investigation of his income tax liability.

(5) It was further a part of the said conspiracy, that the defendant and his co-conspirators would represent to and impress upon the said Francesco Mogavero and his attorney, Albert Herskowitz, that the said defendant and his co-conspirators had connections and influence within the Bureau of Internal Revenue, and with officers and employees of the Bureau of Internal Revenue, and that they by the exercise of such influence and the utilization of such connections, would be able corruptly to procure a disposition of the investigation then being conducted by the Bureau of Internal Revenue into the tax liability of the said Mogavero for the years 1942, 1943, 1944, 1945, 1946 and 1947 in a manner favorable to Mogavero and without the institution of criminal proceedings or the assessment of additional taxes.

(6) It was further a part of the conspiracy that, upon the receipt of payment of the sum of money by the said Francesco Mogavero to the said ERNEST T. WALDIN, the defendant and his co-conspirators would exercise their aforesaid influence and connections within the Bureau of Internal Revenue, and with officers and employees of the Bureau of Internal Revenue, corruptly to obtain the termination of the investigation then being conducted by the Bureau of Internal Revenue into the tax liability of the said Francesco Mogavero for the calendar

years 1942, 1943, 1944, 1945, 1946 and 1947 corruptly to obtain the acceptance as correct of the tax returns of the said Francesco Mogavero by the Bureau of Internal Revenue for the payment of any of the additional income taxes which might be owing the United States by the said Francesco Mogavero for said years, and corruptly to prevent the institution of any criminal proceedings against the said Francesco Mogavero, although such action would result in the defeat and evasion of a large part of the income taxes which were then due and owing the United States by the said Francesco Mogavero, would defeat and evade the proper administration of the Internal Revenue Laws, and would corrupt officers and employees of the Bureau of Internal Revenue.

(7) It was further a part of said conspiracy that the defendant, ERNEST T. WALDIN, would solicit and receive from the said Francesco Mogavero the sum of $20,000.00 as consideration for the effecting, by the defendant and his co-conspirators, of the termination of the aforesaid investigation, the acceptance of the aforesaid returns as correct, the prevention of the assessment of additional taxes and the forestalling of criminal prosecution of said Mogavero.

(8) It was further a part of the said conspiracy that upon the receipt of the said $20,000.00 payment the defendant ERNEST T. WALDIN, would promise and assure the said Francesco Mogavero that the defendant and his co-conspirators would procure the termination of the aforesaid investigation, the acceptance of the tax returns as correct, the prevention of the assessment of additional taxes and the forestalling of criminal prosecution.

THAT in order to effect the object of said conspiracy the following overt acts were committed:

1. On or about August 1, 1949 ERNEST T. WALDIN and one of his co-conspirators informed Albert Horskowitz, Esq., that indictment of his client, Francesco Mogavero, was contemplated, and that the contemplated indictment could be suppressed by certain persons providing Mogavero "put up" what money they would ask.

2. On or about September 14, 1949 ERNEST T. WALDIN informed Francesco Mogavero that he had a "contact" who could "straighten out" Mogavero's tax affairs.

3. On or about September 15, 1949 ERNEST T. WALDIN and one of his co-conspirators informed Francesco Mogavero that he was in a lot of trouble and was going to be indicted, but that it could all be "taken care of" and his tax liability reduced, if he would pay the sum of $20,000.00.

4. On or about September 19, 1949, ERNEST T. WALDIN demanded of Francesco Mogavero the sum of $20,000.00.

5. On or about September 26, 1949 ERNEST T. WALDIN demanded of Francesco Mogavero the sum of $20,000.00.

6. On or about October 6, 1949 ERNEST T. WALDIN demanded of Francesco Mogavero the sum of $20,000.00.

7. On or about October 7, 1949 ERNEST T. WALDIN received from Francesco Mogavero the sum of $20,000.00, and at that time promised Mogavero that there

would be no indictment and that his tax liability would be "cut down."

TRUE BILL

_____

Foreman

September 20, 1955

_____

W. Wilson White,
United States Attorney

III.

OPINION

(Filed Feb. 16, 1956)

(Criminal Nos. 18412 and 18512)

Lord, J. February 16, 1956

This action is before the Court on Defendant's Motion to Dismiss Indictments 18412 and 18512.

The defendant was indicted on June 1, 1955 under indictment number 18412, with violation of 18 U.S.C.A. § 371 and 26 U.S.C.A. § 145(b). Subsequent to this, on September 20, 1955, a superseding indictment (indictment 18512) was returned by the grand jury. This latter indictment contained all the charges included in the former one; however, it also contained another offense, to wit, violation of 26 U.S.C.A. § 4047(e) (4).

Because of the overlapping of the two indictments and in the interests of brevity, I shall consider only indictment 18512 and the disposition accorded it will control both.

Indictment 18512 charges that the defendant was a Deputy Collector of Internal Revenue when the tax liability of one Francesco Mogavero was under investigation. Further, that defendant conspired with unknown persons to put Mogavero in fear of criminal prosecution and that defendant represented to Mogavero that their influence within the Internal Revenue was such that they could straighten out his difficulties by Mogavero paying defendant and his unknown associates $20,000.

Opinion Filed Feb. 16, 1956

The requisite overt acts charged in the indictment consisted of statements by both defendant and others to Mogavero that they could use their influence to procure termination of the investigation of his affairs and his tax liability reduced; demands by both defendant and another for the sum of $20,000 and finally receipt by defendant of that sum from Mogávero.

The issues raised by the briefs are:

1. Must an indictment charging a defendant with conspiracy in violation of 18 U.S.C.A. § 371, 26 U.S.C.A. § 145(b) and 26 U.S.C.A. § 4047(e) (4) allege an overt act to effect the object of said conspiracy?

2. Are the present indictments insufficient for failure to allege such an act?

3. Is indictment 18512 insufficient to charge a violation of 26 U.S.C.A. § 4047(e) (4) by reason of its failure to allege that the defendant was acting under the authority of a revenue law?

I will consider the issues in that order.

The pertinent portions of 18 U.S.C.A. § 371 read as follows:

> "§ 371. Conspiracy to commit offense or to defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof *in any manner or for any purpose*, and one of such persons *do any act* to effect the object of the conspiracy, . . ." (Emphasis supplied)

The legislative history of this statute was discussed by this Court in United States v. Tanz, Criminal No. 18458 (1955) and need not be repeated here. Suffice to say that section 371 is a general conspiracy statute and is applicable to *any one* who in *any manner* attempts to commit any offense against the United States.

It is expressly stated in section 371 that to have an actionable violation in the form of a conspiracy there must be an overt act in furtherance of the conspiracy thereby giving effect to the object of the conspiracy.

Title 26 U.S.C.A. § 145(b) invokes a penalty upon any individual who wilfully attempts in any manner to evade or defeat any tax. The pertinent portion of this section reads:

> "§ 145. Penalties
>
> . . .
>
> (b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and *any person* who wilfully attempts in *any manner* to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, . . ." (Emphasis supplied)

It is apparent that the wording and phrasing of this section is similar to that used in the general conspiracy statute, section 371. However, one difference should be noted. Title 18 U.S.C.A. § 371 finds its birth in the criminal code whereas 26 U.S.C.A. § 145(b) arises by virtue of the internal revenue code. It is too well settled to warrant

citation of authority for the proposition that statutes imposing criminal liability are to be strictly construed. With this principle in mind, I am, by the very clear and express provisions of both sections, obliged to conclude that each section is applicable in its scope to any person who in any manner attempts to evade or defeat by fraud or otherwise taxes due the government.

The defendant has raised a question as to the applicable period of limitation. Section 3748 of 26 U.S.C.A. covers violations of the internal revenue laws of the United States and, in pertinent part, states:

"§ 3748. Periods of limitation

(a) Criminal prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

. . .

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U.S.C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or

the payment thereof, the period of limitation shall also be six years. . . ."

Defendant agrees that the proper period of limitation is six years with respect to 18 U.S.C.A. § 371. However, he urges that for the six-year period to apply to 26 U.S.C.A. § 145(b) an act must be shown on the part of the defendant to effect the object of the conspiracy. This contention brings into consideration the second issue and the prerequisite overt acts necessary to sustain a violation of 18 U.S.C.A. § 371 (the general conspiracy statute), as well as the applicable period of limitation to be applied to 26 U.S.C.A. § 145(b).

It is not questioned that an overt act is a vital element when grounded in a general conspiracy statute as in the instant case. Nor is it disputed that a mere conspiracy, without an overt act done in pursuance thereof, is not criminally punishable. Hyde v. United States, 225 U. S. 347, 359 (1911). However, the overt act need not be of itself a criminal act and still less need it constitute the very crime that is the object of the conspiracy. United States v. Holte, 236 U. S. 140, 144 (1914). Even though the conspiracy be fully formed, it may fail in its object and the contemplated crime may never be consummated, yet the conspiracy is none the less punishable. Williamson v. United States, 207 U. S. 425, 447 (1907).

It is submitted by the defendant that no such overt act is stated in either indictment and therefore the indictments fail to state facts sufficient to constitute an offense against the United States. The indictment alleges seven overt acts. The first act alleged that the defendant and one of his co-conspirators informed the taxpayer's attorney that a contemplated indictment against his client could

be suppressed by certain persons providing Mogavero "put up" what money they would ask. The second alleged act was that defendant informed Mogavero that he has a "contact" who could "straighten out" Mogavero's tax affairs. Thirdly, that defendant and one of his co-conspirators informed Mogavero that he was in a lot of trouble, and was going to be indicted, but that it could all be "taken care of" and his tax liability reduced, if he would pay the sum of $20,000. The fourth, fifth and sixth acts consisted of the defendant's demand for the money. The seventh and final act charged was that defendant received from Mogavero the sum of $20,000, and at that time promised Mogavero that there would be no indictment and that his tax liability would be "cut down".

The defendant earnestly contends that "not one act of all of the seven alleged to have been committed bears the slightest relevancy to the evasion or defeat of any tax or the defrauding of the United States." With this I cannot agree. It is my opinion that the acts alleged are sufficient to support a charge of conspiring to defeat or defraud the United States of tax monies. In the instant case each act was a logical and necessary step in the carrying through of a carefully formulated scheme. The very first overt act alleged, i.e., defendant calling Mogavero's attorney and informing him of the contemplated indictment of Mogavero, is of such a nature that without it there could never be an achievement of the object of the conspiracy. This is not to say that the overt act must be in and of itself of such a character as to be an integral part of the conspiracy and that the failure of it would cause collapse of the planned object. United States v. Holte, supra. Indeed, the act itself may be lawful and of no particular significance by

itself, yet if it be directed toward a desired object which is unlawful, it is punishable. By the second act, the defendant let it be known to the taxpayer directly that defendant could suppress the contemplated indictment if he, Mogavero, "put up" money. The third act was the demand for a stipulated sum, to wit, $20,000. The fourth, fifth and sixth acts flowed freely in the current of this scheme, they being the actual demands for the monies for the services rendered by the defendant and his co-conspirators. Finally the curtain fell on the last act, and defendant was "paid off". To say these acts are meaningless and there is not the slightest connection alluded to between the alleged extortion from Mogavero and a United States loss of tax revenue or departmental corruption is to spread the cloak of immunity over those whose intent is clearly manifested.

The defendant cites numerous cases in support of his contention, none of which is the case at bar. He relies upon Hyde v. United States, 225 U. S. 347 (1911) in support of his position that an overt act is necessary to complete the offense. There is no disagreement with this principle. However, it is worthy of note that the court said in the Hyde case (p. 360):

> "... The action of the latter was to be induced or influenced; and this might be through deception, it might be through fraud, or it might be through innocent agents and acts of themselves having no illegality, but effectually causing and moving official action to the consummation of the end designed and contemplated. Overt acts of all these kinds were charged. The bribery and deception of the officers, the intervention of attorneys and the seemingly harmless mail-

> ing of information and directions all are charged and all had some relation to the scheme devised and were steps to its accomplishment. . . ."

This case involved an action brought under section 5440 of the Revised Statutes which is the predecessor of the statute presently before the court.

The defendant urges that since there is no allegation that any of the departments of the government, or its agents, were contacted officially, unofficially, legally or illegally, no crime has been made out against the United States and therefore the overt acts alleged are of no import. The Statute in question (18 U.S.C.A. § 371) clearly states "If two or more persons conspire . . . in *any manner* or for any purpose . . . [to] do any act to effect the object of the conspiracy . . ." The conspiracy coupled with the overt act to defraud the United States is the crime, and it is not a requisite element that overtures be made to the government or any agency or department thereof. This conclusion is clear from a reading of the statute. It is further supported by the case of Heskett v. United States, 58 F. 2d 897 (9th Cir. 1932) when the court said (p. 902):

> "To sustain the conspiracy count, it was necessary for the government to prove only that the accused entered into an agreement so to represent themselves, and that, in furtherance of that agreement, they committed one of the overt acts charged in the indictment. . . ."

The final issue to be decided is the sufficiency of the indictment charging violation of 26 U.S.C.A. § 4047(e) (4) by reason of its failure to allege that defendant was acting under the authority of a revenue law. This involves an interpretation of the Statute.

The defendant is indicted as an officer and employee of the Internal Revenue Department. However, the defendant asserts that the charged violation is improper because defendant did not represent himself as a Revenue Officer and that the victim did not know he was a Revenue Officer. Therefore, he argues, he was acting outside his department and in the capacity of a private citizen and cannot be indicted for violation of section 4047(e) (4). As authority for this, defendant cites United States v. Gerdel, 103 F. Supp. 635, 637 (E.D. Mo. 1952). This is clearly distinguishable from the instant case. In the Gerdel case the charged violation was of section 4047(e) (2), whereas the violation under question is of section 4047(e) (4). These two sections are independent of each other and constitute different illegal acts. The facts in the Gerdel case are simple. The defendant there merely prepared income tax returns for taxpayers at their homes in the evening for a fee. The court said that even though "the defendant had a 'duty' to assist taxpayers and prepare income tax returns under regulations or directive at the Collector's office, does not establish conclusively the duty followed him wherever he went after leaving his place of employment."

But this is not our case, for the acts of Gerdel did not consist of a fraudulent scheme to defeat or defraud the United States of tax monies due.

The pertinent portions of the act under construction (26 U.S.C.A. § 4047(e) (4)) read:

> "(e) Every officer or agent appointed and acting under the authority of any revenue law of the United States—
>
> . . .

Opinion Filed Feb. 16, 1956

"(4) Who conspires or colludes with any other person to defraud the United States; or"

To sustain defendant's contention that the fraudulent act must be done under the authority of his office would be to unduly restrict the scope of the statute. The statute is *descriptive only.* An agent or officer of the Internal Revenue Department occupies a position of utmost fidelity and loyalty to the government and as a necessary consequence to this is vested with access to records and knowledge not available to the taxpayer in general. It is because of this that Congress enacted section 4047 and provided therein a greater penalty when an officer or agent breaches his responsibility to insure that his duties be performed with utmost faithfulness and loyalty.

At the time defendant communicated with taxpayer he was in fact a revenue agent and is alleged to have conspired to defraud the United States. The mere fact that defendant did not make his capacity as an agent known to the taxpayer and the act was committed outside of the "zone" to which he was assigned is of little significance. The important fact is that at all the times alleged he was employed by the Internal Revenue Service. If the court should adhere to defendant's interpretation of the statute, it would result in the strained conclusion that *only* if defendant made his capacity as an agent known to the taxpayer, and further, committed the questionable acts *only* within the "zone" assigned could he be charged with violation of section 4047(c) (4). With this I cannot agree.

The defendant was before this Court on other charges involving the same offense. The Court dismissed the indictment. United States v. Waldin, No. 15625, July 23,

Opinion Filed Feb. 16, 1956
Order

1951. At that time the government charged violation of section 4047(e) (10). Judge Ganey stated in construing section 4047(e) (10):

> "Since the defendant in the instant case had no authority to *compromise, adjust or settle* the taxpayer's alleged violation of law, he cannot be indicted under this statute. This conclusion is reached with extreme reluctance, . . ." (Emphasis supplied)

In the case at bar, in addition to the other Statutes hereinbefore recited, the defendant is charged with violation of section 4047(e) (4) which is for conspiracy and is a different offense than that ruled upon by Judge Ganey. I therefore conclude his ruling is not controlling here.

It is my opinion that the indictments as stated are sufficient in all respects and therefore the defendant's Motion to Dismiss is DENIED.

(s) John W. Lord, Jr.,
J.

IV.

TRANSCRIPT OF TESTIMONY

* * * * * * * * *

(4) ANTHONY DeVIRGILIS, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SWOTES:

* * * * * * * * *

Q. Sit down. Make yourself comfortable. Now, where are you employed?

A. Bureau of Internal Revenue, collection division, group supervisor of a collection unit.

* * * * * * * * *

Q. Are you familiar with the duties of a zone deputy collector during the year 1949, what those duties were at that time?

* * * * * * * * *

(5) A. A zone deputy collector in 1949 had to collect what we call delinquent taxes. By that we mean, if individuals would send in tax returns without remittances, an assessment would come down and a zone deputy collector would have to go out and collect that remittance. His other duties were the securing of delinquent returns. The bureau, or the Internal Revenue (6) Service, as it is known today, has what they call a follow-up method, and as a return becomes delinquent the collection officer would go out to secure it. His other duties were also canvassing. That is as the word itself implies. You go out and you canvass a neighborhood to pick up any delinquent returns. And

then, of course, we had the taxpayers' assistant program at the time in which they assisted him.

* * * * * * * * * *

(7) *Cross-Examination*

BY MR. DONOLOW:

Q. Now, Mr. DeVirgilis, you say that a deputy collector collected delinquent taxes. Does that mean that he was—a bill was sent to him or the amount of money was owing was sent to him by someone else and that he would go out to the taxpayer and attempt to collect the tax; is that correct?

A. That is correct.

Q. The deputy collector could not alter the figures in any way?

A. No.

Q. In other words, when he was given an amount of money that was owed by a taxpayer there had already been records made of it, say, in the bookkeeping department or elsewhere?

A. That is correct.

Q. But then he had no authority whatsoever to alter or change or do anything with that amount of money on his own?

A. That is correct.

Q. I see. Now, also was it not true that a deputy collector in 1949 had a zone? In other words, he was assigned to a certain section?

A. That is true, sir.

Q. Certain neighborhood of Philadelphia or section of (8) Philadelphia?

(No response.)

* * * * * * * * * *

Q. Are you in a position also to tell us about the connecting branches with the deputy? By that I mean, there were revenue agents, were there not, in 1949?

A. Yes, sir.

Q. And the revenue agents were distinct from the deputies?

A. Yes, sir.

Q. Where were they located, the revenue agents?

A. In 1949 they were in the Widener Building.

Q. Correct. And where were the deputy collectors located?

A. 1100 Gimbel Building.

Q. And there also was another branch of internal revenue in 1949 called the special agents?

A. That is true, sir.

Q. And where were they connected? Where were they located?

A. At that time they were in the Ayer Building, which is at Washington Square.

Q. And is it not also true that each of these groups (9) operated more or less independently in their investigations?

A. Yes, sir.

Q. Now, so that the jury will get the idea the way they operated, if the revenue agents and the special agents would find a delinquency in a taxpayer investigation, and they would then ascertain the amount, they would then send it to the zone collector or your office to be collected?

A. That is true, sir.

* * * * * * * * *

Q. I see. Now, isn't it true that Mr. Waldin continued in 1949 in your department his operations of just collecting delinquent taxes?

(10) A. To the best of my knowledge I would say yes, sir.

. . . . . .

MR. SWOTES: If Your Honor pleases and members of the jury, Mr. Donolow and I have now entered into an agreement that the following are the facts with reference to Mr. Waldin's employment, and I will read those to you, and of course, if there is any correction Mr. Donolow will advise me.

We agree that the defendant, Ernest T. Waldin, was born on November 26, 1917, and was appointed an office deputy in the office of the Collector of Internal Revenue at Philadelphia on January 7, 1941, that he held that office until June 16, 1942, when he was appointed a zone deputy junior collector of internal revenue, and that he held such office until September 16, 1942, when he was promoted to zone deputy collector, and he held that office until his removal on November 23, 1949, and that Ernest T. Waldin, whose record has been read into evidence, is Ernest T. Waldin, here, the defendant.

Now, I might also add to that—I believe it is also true, Mr. Donolow—we might state for the benefit (11) of the defendant that his zone did not include the residence of Dr. Mogavero.

MR. DONOLOW: That is correct.

. . . . . .

ALBERT S. HERSKOWITZ, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SWOTES:

* * * * * * * * *

Q. And did you at any time know a Dr. Francesco Mogavero?

A. Yes, I did.

Q. He is now deceased, is he not?

(12) A. He died.

* * * * * * * * *

Q. Now, I would like to ask you, sir, to direct your attention to the early part of 1949 and tell us whether at that time you had any occasion to represent Dr. Mogavero.

A. Yes, I did.

Q. Will you tell us in what connection.

A. Specifically in connection with his income tax matters. Dr. Mogavero had consulted with me the latter part of 1948 concerning an examination that had been made of his records for the five-year period from 1943 to 1947, inclusive, and had discussed with me the problem of his difficulties with the agent who was examining his records.

Q. Now, did you as part of your representation of him ever attend a conference with revenue agents?

A. Yes, I surely did.

Q. Do you recall approximately when and where that (13) conference took place?

A. Sometime possibly the latter part of January of 1948—it may have been the first part of February of 1948—in the Ayer Building—

Q. And—

A. And on several other occasions I had meetings with Mr. Johnson in my office in connection with this matter. I think on one or two of those occasions he had an intelligence man with him.

Q. Now, in your conference at the Ayer Building did you at that time make any efforts to determine what if anything Dr. Mogavero owed the government?

A. Yes. I did. As a matter of fact, the only reason why Dr. Mogavero had asked me to come into this matter, the only reason why was to ascertain what if any deficiency there may exist, because this investigation or examination, whichever you want to call it, had been going on for at least a year. Dr. Mogavero was a man who worked under a great deal of tension, pressure—

* * * * * * * * *

(15) Q. Now, did you ever contact the defendant?

A. Yes. I did.

Q. Would you tell us when you contacted him and the nature of the contact with him.

A. I made a phone call to the defendant.

Q. Any recollection as to about when you made that call?

A. I am groping—around the latter part of March of 1949, possibly the first week of April of 1949. The result of that (16) conversation was that a meeting was immediately arranged for the defendant and myself to go to the office of Dr. Mogavero at 1930 Chestnut Street.

Q. Now, what did you say to Mr. Waldin when you called him on the phone and what did Mr. Waldin say to you, if you recall, approximately?

A. The conversation was to the effect that I had a matter where I am trying to get information that I can not get from the ordinary sources concerning a possible discrepancy of tax liability, and I asked him to meet me, and we did. We got into the taxicab and drove to Dr. Mogavero's office.

Q. Now, did Mr. Waldin meet you the same day or some other day?

A. I think it was within an hour.

Q. He came to your office?

A. He came to my office where we met in the office and went out—I think that is exactly what we arranged to do—got into a taxicab and went to the doctor's office.

Q. Where was the doctor's office?

A. 1930 Chestnut Street, Room 707.

Q. And did you meet Dr. Mogavero there?

A. That is right. On our trip from the office at 1420 Walnut I gave the defendant a thumbnail description of the problem and told him that if he could do it in the right way we (17) should get it done, and if he can't do it, to be frank with Mogavero, and let us leave it at that.

Q. And did you then meet with Dr. Mogavero and the defendant?

A. I introduced Dr. Mogavero to the defendant and the doctor repeated every salient feature that I had already narrated to the defendant—that is, the problem of our inability to get information from the examining agent, the fact that there were a good many stories rumored around of the doctor's liability, which were not only irritating but bearing down on his capacity to do his work and creating a good deal of anxiety in the family, and he

said he would see, the defendant said he would see what he could find out and report back to me.

Q. And then you and the defendant left; is that correct?

A. Yes. We did.

Q. Now, what contacts subsequently did you have with Mr. Waldin with reference to this matter?

A. He would call me and I would call him. I didn't keep any direct record of every phone call I made or he made to me concerning this matter, and he reported from time to time about the matter, and, among other things, he reported definitely to remove any concern from Dr. Mogavero's mind and told me that there was no fraud indictment involved in this case; it was just a situation where the deficiency was to be ascertained or was being ascertained and he was going to get those (18) figures for Dr. Mogavero.

Q. Now, did you around the end of July or the beginning of August, 1949, have a conversation on the telephone with the defendant that stands out in your mind?

A. Over a period of about a month or more that these conversations were going on, I was most anxious, and so was Dr. Mogavero, to find out what figure or figures there may be. Finally, the last week of July, or possibly the first week of August, I would say it certainly was a few days after Dr. Mogavero had gone away on his vacation to Guatemala, I received a phone call from the defendant.

Q. Now, how did you know it was the defendant?

A. I spoke to him on the phone. I knew his voice very well.

Q. And what was the nature of your conversation with him?

A. He said to me that he had a man who he was with who was a friend of his who he identified by the name of McDougal, that they were in a restaurant eating, and that McDougal wants to help him and, of course, in turn help Dr. Mogavero through me. He told me to talk to McDougal.

Q. And then what happened?

A. McDougal got on the phone.

Q. Pardon?

A. McDougal got on the telephone.

Q. And then you had a conversation with McDougal?

(19) A. Right after he got off the phone McDougal got on the phone.

Q. And then you had a certain conversation with McDougal; is that correct?

A. I had a certain conversation with McDougal.

Q. And then—

A. And after I concluded that conversation with McDougal I asked McDougal to put Mr. Waldin back on the phone again, and he did.

Q. And what conversation did you have with Waldin?

A. I told Mr. Waldin exactly what McDougal had said to me. He said, "That is right."

I said, "Well, that is out."

Q. Well, what did you say to Waldin McDougal had said to you?

A. I told Waldin that McDougal had said to me that $20,000 would have to be put up to avoid indictment and prosecution for income tax evasion. It was no longer a

matter of figures; it was a question then of getting relieved of any criminal prosecution.

Q. And what did Waldin say to you?

A. Waldin says that it wasn't for him and he said it wasn't for McDougal. He said it was for these—quoting himself—these other guys.

(20) I said, "What other guys?"

He said, "The fellows that are going to take care of this thing."

Q. And what else was said, if anything, between you and Mr. Waldin on that occasion?

A. I told him to forget about it, that that is not what we started out to work out here, and that wasn't our intention, and I had told him, reminded him, rather, that originally we had discussed this thing from the standpoint of trying to do something for Mogavero, who is a friend of mine, was entitled to some consideration. I felt as though Waldin was under enough obligation to me personally, that if there was any legitimate source of obtaining information concerning any tax liability of Mogavero, it should be had. There was nothing in our discussions at any time prior to that initial—prior to that particular conversation in July or the first week of August dealing with any payment of any money to anybody.

Q. What if anything did Mr. Waldin say to you would happen if the money was not put up?

* * * * * * * * *

(21) There was so much conversation that during the course of my conversation with both McDougal and Waldin, Waldin kept on telling me that this is the best way out, that Mogavero's name will be spread all over

the paper. "I wouldn't like to have anything like that happen to him."

BY MR. DONOLOW:

Q. Well, now, you said this McDougal—I didn't get who said this.

A. I said there was a lot of conversation between myself and both Waldin and McDougal. I then said directly after that, repeating what I have just said before, Waldin said to me that this would be the best way out, that a lot of unfavorable publicity would be avoided. He used the phrase, "This will be spread all over the paper," that, "He is in a lot of hot water." I can't grasp for the moment some of the other things he said, (22) but they all concerned themselves with the substance of it—that is, that Mogavero was in serious difficulty about income-tax evasion, which—

MR. SWOTES: All right. Thank you, sir.

THE WITNESS: —which he felt I would be very much concerned about, and I was concerned about it. I said to him, as I had said before—I said this several times to him—"There is no money going to be spent in this manner for that sort of thing."

BY MR. SWOTES:

Q. And was that the conclusion of your conversation at that time?

A. That was a conclusion of our conversation at that time.

Q. Incidentally, how long had you known Mr. Waldin?

A. Since about 1934.

Q. Had you ever represented him?

A. I had represented him.

Q. Now, what was the next conversation you had with Mr. Waldin?

A. The last and the next, and the last conversation I had with Mr. Waldin about this matter or any other matter was on September 20 of the same year.

Q. Had there been any conversations intervening between this August, November, or whenever you said it was, the end of (23) July or the beginning of August, and the conversation on September 20?

A. I don't think there was any conversation that leaves a mark in my recollection at all.

Q. What happened?

* * * * * * * * *

The last conversation, the next and the last conversation I had on September 20, 1949, was when Waldin called me again, told me that he was going to be or he had been in touch with Dr. Mogavero, pressing him to accept this proposition of putting up $20,000 to avoid this tax prosecution.

I had very little to say to Waldin at that time, because from what I had said before to him, but he told me this:

"I wanted to do something for your man. I want to do something for Mogavero. He came over and took care of my mother for me, and I like him," he said, "but I tried to set this thing up for these other people and," he said, "this is the only way out in this matter."

I made no comment one way or the other, whether (24) it was the only way, because I knew what he

was trying to do, and I—well, I know I am going—there is going to be an objection; so I better not say it.

BY MR. SWOTES:

Q. Well, why did you say nothing one way or the other?

A. Frankly, I knew then that Mogavero wouldn't go for it, because I knew about his attitude about this whole thing from the very beginning, because on his return from his vacation I narrated to Mogavero what had taken place and, of course, I knew his reaction, and I knew his reaction, anyway, because I knew Dr. Mogavero for pretty close to twenty years up to that time, and I knew he was a man far above that sort of thing. Even if I was willing to do it for him, or help him do it, I knew Mogavero was too righteous an individual to be involved in such a thing.

* * * * * * * * *

(25) BY MR. SWOTES:

Q. That was the last conversation you had with Mr. Waldin?

A. That was the last conversation I had with Mr. Waldin.

* * * * * * * * *

Cross-Examination

BY MR. DONOLOW:

Q. Mr. Herskowitz, you testified in this case on September 25, 1950, did you not?

A. I don't remember the date, but I remember being examined and cross-examined.

Q. The last time that this case was in trial in 1950, you testified that day?

A. Yes, sir.

Q. Now, let us then go back to prior to April of 1949. You just testified that you were helping Dr. Mogavero with his tax matters?

A. Yes, sir.

Q. And I think you said now, as you said then, that this was an examination?

(26) A. Yes, sir.

Q. It wasn't an investigation; it was just an examination?

A. I felt that it was only an examination.

Q. All right. Now, involved in Dr. Mogavero's examination was Mr. Johnson, I understand, who is a revenue agent; is that—

A. That is correct.

Q. And Mr. Curtin, who is a special agent?

A. That is correct.

Q. And I think you testified that you had attempted to secure information as to determine whether Dr. Mogavero owed any liability whatsoever and you could not?

A. That is correct.

Q. So that as of or prior to April of 1949 there was no indication from the department to you or to Dr. Mogavero in your presence or as his attorney whether or not he was in any difficulty at all with the revenue department prior to April, 1949?

A. As far as the department was concerned, sir, there appeared to be no reason to believe that Dr. Francesco Mogavero was in any way involved in what may be construed as a tax-evasion case.

Q. That is right.

A. However, there was at that time a good deal of rumor—

Q. Well, now, I don't want to get to rumors. I want to get (27) to the official department. We will get into the rumors. So far as the defendant was concerned, there was no—as far as you were told or what you do there was nothing wrong, as was told you, as far as Francesco Mogavero's income tax was concerned?

A. That is right.

Q. Of course, there were a great many rumors going around and there were a great many people calling up for Dr. Mogavero; is that right?

A. Yes. Well—

Q. Just answer my question. Was that so?

A. Yes. A lot of people were talking to him as well as calling him.

Q. Now, isn't it so that in April of 1949 Dr. Mogavero was called to a home of two doctors. Now, I say April, 1949.

MR. DONOLOW: Now, wait a minute. He knows about this. It was discussed with him.

. . . . . .

(29) Q. Now, Mr. Herskowitz, you in April of 1949 called Mr. Waldin to come to meet Dr. Mogavero; is that correct?

A. That is correct. Yes, sir.

Q. Mr. Waldin had nothing to do with Dr. Mogavero's investigation or examination or anything?

A. No, absolutely right.

Q. And you prevailed upon him because you said he owed you obligations?

A. That is correct.

(30) Q. And you called this fellow that you had known for fifteen years and you told him to come to meet Dr. Mogavero; is that correct?

A. That is right.

Q. And it wasn't until he got into the taxicab that you told him what it was all about?

A. That is right. I may have said something to him over the phone of no importance about it, but the real substance I told him in the cab.

* * * * * * * * *

(31) Q. Now, Mr. Herskowitz, isn't it true that Dr. Mogavero said that he was called down to a Dr. Squillace's office—

A. Dr. who, please?

(32) Q. Squillace—S-q-u-i-l-l-a-c-e—and that he was shown a telegram which was covered with tape, but in one place it said that he was in serious trouble and that he was told he was to be indicted?

A. I remember some conversation about the telegram, Mr. Donolow, but I don't remember this doctor's name that you are referring to.

Q. Well, then, let us say that Dr.—

A. Some doctor or somebody he told us. I think he was a doctor, but I don't remember the man's name. That is all.

Q. Would it help you further that the doctor also at this conference said that there was a South Philadelphia politician there by the name of Michael Tenit?

A. I heard that name mentioned.

Q. And that Michael Tenit told the doctor he was in serious trouble and was to be indicted?

A. I don't remember that part, but I remember the name mentioned. I do know about the telegram, but I never saw it.

Q. Now, didn't at that meeting Mr.—didn't at that meeting Mr. Waldin reassure the doctor that the telegram was a fake?

A. I don't know who said it, but I felt the same way that Mogavero really felt, that—

Q. I am asking you, did Mr. Waldin tell the doctor that it was a fake?

(33) A. I don't remember, but our consensus was that it was a fake, our joint opinion was that it was a fake. I mean by, "our joint opinion," the opinion of all of us there.

Q. Now, on Page 29 of your testimony in 1950 you testified that, "I was told by Dr. Mogavero that he was told by some person that the report had come that Dr. Mogavero was to be indicted. That was a statement made to him." You were referring prior to the April meeting.

MR. SWOTES: Where is that, Mr. Donolow?

MR. DONOLOW: Page 29.

MR. SWOTES: Oh, yes.

THE WITNESS: Will you please read the statement that I made.

BY MR. DONOLOW:

Q. Well, let us then start at Page 28. This is a question by me.

"Q. All right, Mr. Herskowitz, did you or did you not just testify that the telegram Dr. Mogavero related to you as being told to him by someone contained the fact that he was to be indicted?"

And you said:

"A. So that there will be no doubt about it, the telegram was completely covered by court plaster, or tape, or adhesive tape was spread supposedly over all of the (34) wording in that telegram. I never saw the telegram, but this was told me by Dr. Mogavero."

And I was going to ask you something. The Court said, "Let the witness finish his answer."

You said:

"May I? I was told by Dr. Mogavero that he was told by some person that the report had come that Dr. Mogavero was to be indicted. That was a statement made to him."

Is that correct?

A. Whatever I testified to then, surely—

Q. So that—

A. —is what the testimony would be here today.

Q. So that when Mr. Waldin in April of 1950 came to visit Dr. Mogavero at your instance, somebody had told Mogavero that he was to be indicted, and he already was carrying such thought in his mind, had nothing to do with Waldin, he hadn't even spoken to the doctor?

A. Yes. That is right. He had that stated to him by a lot of people.

Q. Oh, I see. So that the threat of indictment hung over this situation?

A. At that time.

Q. At that time?

A. Then subsequently Waldin—

(35) Q. All right. Now, we will get into that.

A. All right.

Q. Now, you said that in July or August you were told—you were put on a conversation on the telephone, had a conversation with a man by the name of McDougal or purporting to be a man by the name of McDougal?

A. I was introduced to him as such by your client; so he must have been Mr. McDougal.

Q. Well, so, we don't know that.

A. Well, you said that he purports to be. Your client said that he was Mr. McDougal.

Q. Well—

A. Well, surely your client told the truth to me then, I hope.

Q. If it will help you out, we will say it was—

A. Don't help me out.

Q. Now, Mr. Herskowitz, at the end of July or the middle of August a man told you or McDougal told you it would cost the doctor $20,000 or else his name was to be indicted and his name was to be spread all over the newspaper; is that correct?

A. That is correct.

Q. Of course, Waldin—this was a conversation between you and Waldin as a result of the conversations had with McDougal, that either $20,000 was demanded or else the doctor would be (36) indicted and his name would be spread all over the newspapers; is that correct?

A. That is right. That is what Waldin told me.

Q. Right.

A. And McDougal told me.

Q. Right. When did you tell Dr. Mogavero this conversation?

A. When I saw him after his return from his vacation.

Q. Suppose you tell us when.

A. I fix that some time before, a short time before the next conversation I had with Waldin, which was in September.

Q. In other words, you didn't speak—you didn't tell anything to Dr. Mogavero about this $20,000 until September 20, did you?

A. That is right.

Q. So that—

A. Dr. Mogavero wasn't even in the United States, sir.

Q. Are you sure about that? Didn't Dr.—

A. I didn't go to see, but he told me he was leaving for Guatemala with his wife.

Q. Wait a minute. Didn't Dr. Mogavero return from Guatemala at the end of August?

A. That may very well be.

Q. And didn't you speak to Dr. Mogavero on September 14 and he told you to call the intelligence?

(37) A. Me?

Q. Yes, you.

A. No, not me, sir. I was out of the city.

Q. You were out of the city the 17th, 18th and 19th?

A. Yes.

Q. Is that correct?

A. I think the 17th was on a Friday. I don't think I was to Dr. Mogavero until I returned from Kingan College, and my recollection is that I didn't speak to Dr. Mogavero until I returned from Kingan College, and I saw him on the Sunday after my return at the Misericordia Hospital when my wife and I were visiting one of our friends who was one of his patients on the fourth floor at 54th and Cedar.

Q. So that on September 14 you were telling us that Dr. Mogavero did not call you and tell you to call intelligence to get some information?

A. I don't remember that conversation now. I don't remember such a conversation.

Q. Now, did you have it or didn't you have it?

A. I say, I don't remember that conversation now.

Q. So it is a possibility that you did have it?

A. I don't know whether I did and I don't know whether I didn't. I say, I don't remember the conversation now.

Q. Well, now, Mr. Herskowitz, this was mighty important if (38) somebody wanted to take $20,000 from your client whom you claim here you were protecting so zealously. Don't you think you should have called him immediately and told him?

A. Called him immediately? We weren't going to let him take $20,000 from Dr. Mogavero. We were just going to ignore that demand. That is all.

Q. But you had never spoken—

A. That was my attitude about it. If a client walks into my office—

Q. Now, wait a minute.

A. —and tells me to take care of a matter—

Q. Wait a minute. I don't care what a client does when he comes into your office.

A. Well, I do care. You are inferring that I would be unzealous about my client's interests.

* * * * * * * * *

(39) *Cross-Examination*

* * * * * * * * * *

Q. Now, Mr. Herskowitz, did you know or had you learned that Mr. Waldin had visited Dr. Mogavero on the 15th of September at his home?

A. 15th of September?

MR. SWOTES: I think, sir, that would depend upon whether Mr. Herskowitz was there or not.

MR. DONOLOW: No. I didn't ask him about the conversation, Mr. Swotes. I just asked him—

THE COURT: Yes. He can answer that yes or no, if he remembers.

THE WITNESS: Well, I would remember it if it happened—that is, if I knew it happened. I don't know anything about a meeting on the 15th of September, but I knew of other meetings. Is that all right with you? Would that help you?

MR. DONOLOW: Well, just give us the dates.

(40) MR. SWOTES: If you remember, Mr. Herskowitz.

THE WITNESS: I don't remember the exact date, Mr. Donolow, but I do know that the defendant had told me that he had been to see and again was going to see—

BY MR. DONOLOW:

Q. Well, this was on the 20th when you spoke to him on the phone?

A. Oh, yes. That is right, on the 20th. He had been to see and he was going to see the doctor about the same matter.

Q. All right.

A. —and then heard from him—

Q. All right.

A. —on this call, what I would call the McDougal (43) conversation.

Q. Right. Now, over this period of two or three months when you spoke to Mr. Waldin did he not advise you that there was no fraud liability involved?

A. That is right.

Q. And didn't he also assure you that this matter was not a fraud case?

A. That is correct. He assured me of it.

Q That is right. So then on September—at the latter part of July or the end of April, you testified then he told you that you had to pay $20,000 to quash the indictment?

A. The latter part of July and the beginning of August you mean, don't you?

Q. Yes. That is what I said.

A. I thought you said "April."

Q. No, no. I am sorry. I mean, the latter part of July or August he then told you—

A. That is right.

Q. —after then telling you there was no fraud case—

A. That is right.

Q. —all these months?

A. That is right.

Q. Well, did he tell you what changed the situation?

A. He told me the heat is on. He told me the doctor is in (44) hot water. That is all I got out of him.

Q. But he had nothing to do with this case?

A. I knew he didn't. He was only asked to do certain things for us, and he was coming in and asking for $20,000 at that point, and all prior to that time he told us nothing of the sort. Contrariwise, he was telling us, "This case is free from fraud. Tell the doctor not to worry so much about it, not to be in such a dither about it." I am not using the exact words, but I am giving you the substance of it. And then he came along the last week of July or the first week of August with this McDougal story.

Q. Yes. Now, you were the attorney who had handled tax matters, weren't you?

A. I handled some.

Q. Well, how many tax matters did you handle before this, would you say? You have been an attorney—what did you say, twenty-seven years?

A. I am practicing in my twenty-seventh year.

Q. Now, at that time you were an attorney about twenty-some years?

A. That is right.

Q. How many tax matters had you had in your time?

A. I never tried to count them.

Q. And was this the way you would secure information?

(45) A. This is the way that I wanted to secure information, and I would have done anything for Dr. Mogavero that I thought was proper and aboveboard.

Q. I see.

A. I felt as though the defendant was being stubborn and I thought that they were trying to find something that wasn't there.

* * * * * * * * *

Q. All right.

A. —and then heard from him—

Q. All right.

A. —on this call, what I would call the McDougal (43) conversation.

Q. Right. Now, over this period of two or three months when you spoke to Mr. Waldin did he not advise you that there was no fraud liability involved?

A. That is right.

Q. And didn't he also assure you that this matter was not a fraud case?

A. That is correct. He assured me of it.

Q. That is right. So then on September—at the latter part of July or the end of April, you testified then he told you that you had to pay $20,000 to quash the indictment?

A. The latter part of July and the beginning of August you mean, don't you?

Q. Yes. That is what I said.

A. I thought you said "April."

Q. No, no. I am sorry. I mean, the latter part of July or August he then told you—

A. That is right.

Q. —after then telling you there was no fraud case—

A. That is right.

Q. —all these months?

A. That is right.

Q. Well, did he tell you what changed the situation?

A. He told me the heat is on. He told me the doctor is in (44) hot water. That is all I got out of him.

Q. But he had nothing to do with this case?

A. I knew he didn't. He was only asked to do certain things for us, and he was coming in and asking for $20,000 at that point, and all prior to that time he told us nothing of the sort. Contrariwise, he was telling us, "This case is free from fraud. Tell the doctor not to worry so much about it, not to be in such a dither about it." I am not using the exact words, but I am giving you the substance of it. And then he came along the last week of July or the first week of August with this McDougal story.

Q. Yes. Now, you were the attorney who had handled tax matters, weren't you?

A. I handled some.

Q. Well, how many tax matters did you handle before this, would you say? You have been an attorney—what did you say, twenty-seven years?

A. I am practicing in my twenty-seventh year.

Q. Now, at that time you were an attorney about twenty-some years?

A. That is right.

Q. How many tax matters had you had in your time?

A. I never tried to count them.

Q. And was this the way you would secure information?

(45) A. This is the way that I wanted to secure information, and I would have done anything for Dr. Mogavero that I thought was proper and aboveboard.

Q. I see.

A. I felt as though the defendant was being stubborn and I thought that they were trying to find something that wasn't there.

* * * * * * * * *

E. A. Hill—Direct

EDWARD A. HILL, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SWOTES:

* * * * * * * * *

(46) Q. Now, in the year 1949, what was your occupation?

A. I was a group chief in the intelligence unit, Philadelphia division, of the Internal Revenue Service.

Q. And what is your—first of all, what is the intelligence division?

A. Well, primarily the intelligence unit investigates income-tax frauds against the government; however, they at the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue, they can be designated for other duties, other investigations, but primarily our business is to investigate fraud cases.

Q. And you were a group chief?

A. That is correct.

Q. Which indicates that you had certain other men under your supervision?

A. That is correct.

Q. Is that correct, sir?

A. That is right.

Q. Who was your immediate superior?

A. Walter Fleming was then the special agent in charge.

Q. And he was in charge of what area, sir?

A. Philadelphia, Delaware—or, rather, Pennsylvania up (47) into Harrisburg, Scranton and Delaware, and the Philadelphia area.

Q. And he was in charge of all the activities of the intelligence division over that area, wasn't he?

A. That is correct.

Q. Now, at that time did one of your men, one of your subordinates in your group, have under investigation the case of Francesco Mogavero, Dr. Mogavero?

A. They did.

Q. And do you remember about what time that investigation commenced, approximately?

A. Well, to the best of my recollection, that was—came into the office as a—what they term a preliminary case sometime during, I believe it was, August of 1948.

Q. And did the investigation continue up to including October of 1949?

A. It did.

Q. Now, when and where did you first meet Dr. Mogavero?

A. In the office—in the law offices of Walter Gibbons and Thomas Clary in the Fidelity-Philadelphia Building.

Q. Here in Philadelphia?

MR. DONOLOW: And would you give us the date on which you met him.

THE WITNESS: That was September 21 of 1949.

(48) BY MR. SWOTES:

Q. And who was present at that meeting?

A. Mr. Clary, Mr. Fleming, myself, and later the doctor came in, Dr. Mogavero came in.

Q. That was the Mr. Clary who is now a judge of this Court, was it not, sir?

A. That is correct.

Q. And you had certain conversations at that time with those other gentlemen, didn't you, sir?

A. That is right.

Q. And pursuant to those conversations did Mr. Fleming make any assignment to you?

A. He gave me charge of that investigation.

Q. Pardon me, sir?

A. He gave me charge of the investigation which had to do with this matter of alleged extortion.

Q. In other words, as a result of the conversations which you had in the office?

A. There were certain facts brought out and the investigation was put in my hands.

Q. Now, what was the first thing that you did with reference to the investigation?

A. The following day—that would have been September 22—I went down to see Dr. Mogavero in his South Philadelphia (49) office. That was 1311 South 15th Street.

BY THE COURT:

Q. Just at this point, whom were you investigating after this conference? You were assigned by Mr. Fleming to an investigation, and whom were you to investigate?

A. That concerned—

Q. Turn toward the jury.

A. That concerned Waldin.

Q. You were not investigating Dr. Mogavero now?

A. Oh, no; no, sir; no, sir.

THE COURT: I just wanted to be sure about that.

THE WITNESS: Yes. I can see where I have been confusing. And at this conference the defendant's name was brought up.

BY MR. SWOTES:

Q. In other words, you had certain conversations?

A. That is right.

Q. At this conference?

A. That is right.

Q. And as a result of that you started an investigation of the defendant, Mr. Waldin; is that correct?

A. That is right; and subsequently, the next day, on the 22nd, I went down to see Dr. Mogavero in order to get—go over the details with him again in connection with this (50) alleged—

MR. DONOLOW: That is objected to.

THE COURT: The objection is sustained. There might be some hearsay there.

BY MR. SWOTES:

Q. Just tell us what you did, sir, rather than anything that was said.

A. Well, I went down the following morning with—and met the doctor and went over the details of the matter—of the matter again.

Q. And did you at that time examine the premises?

A. I did. I went over—

Q. What was the address of that premises again?

A. 1311 South 15th Street.

Q. And the doctor had an office at that location, did he not, sir?

A. That is correct.

Q. Do you know whether he had any offices anywhere else?

A. Yes, sir. He had another one, to the best of my recollection, about 1930 Walnut Street. I think it was Walnut Street.

Q. Could that be 1930 Chestnut?

A. That could very well be.

Q. And what was the next thing you did after September 22 (51) with reference to this investigation?

A. We had a further conference in Mr. Clary's office on October 3.

Q. Who was present at that conference?

A. Walter Gibbons, Esq., Mr. Clary, Mr. Fleming, Dr. Mogavero and myself.

Q. And what thereafter did you do? What was the next thing that you did?

A. The next thing I did, I took Special Agent DiMaggio down to the doctor's South Philadelphia office. I think that was October 4, the following day.

Q. Whom did you assign to assist you in this investigation which you are now conducting?

A. Special Agents Daniel Tucker, Joseph DiMaggio, Owen Morris, and Special Agent Lynn.

Q. So on October 4 you took Special Agent DiMaggio down to doctor's downtown office?

A. That is right.

Q. On South 15th Street?

A. That is correct.

Q. Was the doctor there?

A. The doctor was there.

Q. Did you introduce Agent DiMaggio to the doctor?

A. I did.

(52) Q. And what if anything did you and Mr. DiMaggio do then on that occasion?

A. I introduced him to Dr. Mogavero for certain reasons, and Mr. DiMaggio also looked over the premises to get the physical aspect of the same.

Q. Now, what was the next part of the investigation that you participated in? Did anything happen on the 5th of October?

A. Yes. I met Special—I met Special Agent Tucker and I met Dr. Mogavero and Special Agent DiMaggio outside of the Penn-Central Bank at 7th and Walnut Street.

Q. And what did you do from there?

A. We went—we went into the bank and I took out a safe-deposit box in my name. We went down to the vault and at that time the doctor turned over to us the sum of $20,000 in bills and—

Q. Was that in cash, sir?

A. That was in cash and bills of denominations of 100—100's, 50's and 20's, as I recall it.

Q. And did you give the doctor a receipt for that money at the time?

A. Oh, by all means. We gave the doctor a receipt. Special Agent Tucker took out the numbers from the bills, the serial numbers from the bills, and I believe Mr. DiMaggio checked them. Of course, we counted the money, and then we put it in (53) the—wrapped it up in the package, sealed the package, put it back in the safe-deposit box along, as I recall it, with the doctor's receipt.

Q. I didn't hear the last answer.

A. We put the money in a package, a sealed package—as I recall, it was a brown Manila package—and put it back in the safe-deposit box along with the doctor's receipt that—duplicate copy, and a list of the serial numbers—and a list of the serial numbers.

Q. I see. What sort of a package? Well, could you describe this package for us that you made up, to the best of your recollection?

A. Oh, I would say it was probably—to the best of my recollection it was about twelve, twelve inches long, and about—I know we had a large safe-deposit box to get it in—and, oh, probably six, eight inches wide.

Q. Was it wrapped in paper?

A. It was wrapped in, as I recall, a brown wrapping paper.

Q. Now, what was the next thing you did with reference to this investigation?

A. The next day, October 5, I received the call, phone call from Dr. Mogavero, as a result of which the following day the special agents that I named, including myself, three of them, stationed themselves in the doctor's downtown office. (54) Mr. Lynn and I were on the outside of the office.

Q. About what time did you arrive there?

A. Around about ten o'clock in the morning. Mr. Lynn and I took up a—we were in an automobile the other side of Wharton Street where we had a view of the doctor's office. The other three agents were in the doctor's office—that is, Mr. DiMaggio and Mr. Morris and Mr. Tucker.

Q. You and Mr. Lynn were outside?

A. That is correct.

Q. Were you in an automobile?

A. Yes, at that time. Along about a little before one o'clock, as I recall, or about one, we saw a car, Cadillac car drive up and park diagonally across the street from the doctor's office and a man got out.

Q. What do you mean by "diagonally," sir?

A. Well, cater-corner from the—across the street from the doctor's office, but not directly across, but just—

Q. Oh, I see.

A. Yes. This man got out of the car and went into Dr. Mogavero's office. Lynn and I immediately got out of our car and let it lay there, let it stay there, and we went out and took up a position in front of the doctor's office. We stayed there until, oh, I should say probably ten minutes, when the doctor came out and told Mr. Lynn and myself that—

(55) MR. DONOLOW: Objected to.

THE WITNESS: I beg your pardon. Oh.

BY MR. SWOTES:

Q. Well, don't tell us what the doctor said to you. All right. The doctor came out and said something to you?

A. He said something to us as a result of which Mr. Lynn and I went back in the doctor's office, and there we met Mr. Tucker, Mr. DiMaggio and Mr. Morris, who had in custody Mr. Waldin.

Q. Was Mr. Waldin the same man that you saw walk in a little earlier from the Cadillac?

A. He was.

Q. Had you ever met him before?

A. No.

* * * * * * * * *

(57) BY MR. SWOTES:

Q. While you were watching in front of Dr. Mogavero's office or house, whichever it may be, did anyone else enter?

A. No, sir.

Q. Anyone come to the door but not enter?

A. No, sir.

* * * * * * * * *

E. A. Hill—Cross

Cross-Examination

BY MR. DONOLOW:

Q. Mr. Hill, you testified that your office was examining Dr. Mogavero's tax returns for a certain period of years?

A. That is right.

Q. Who was the agent on that, sir?

A. The preliminary was assigned, as I recall it, to Special Agent Conwell.

Q. I see. Conwell?

(58) A. That is right.

Q. And then did a Mr. Johnson take the case?

A. No. Mr. Johnson was a revenue agent.

Q. No, not Johnson. I am sorry. Mr. Curtin?

A. Mr. Curtin, that is right. Mr. Curtin, Mr. Johnson, then conducted what they term a joint investigation.

Q. I see. Now, you had nothing to do with the examination of Dr. Mogavero's returns?

A. Personally, no.

Q. I see. You had just assigned Mr. Curtin?

A. That is right.

Q. Is Mr. Curtin available tomorrow, today?

A. I really don't know.

Q. Now, Mr. Hill—

A. I could say, I don't think he is in the service any more.

Q. I see. Now, Mr. Hill, do you know whether there was any indictment around the—around April to October of 1949 against Dr. Mogavero?

A. Oh, no.

Q. There was not?

A. As far as income-tax evasion, positively not.

Q. There was not?

A. No. The case hadn't been completed.

Q. As a matter of fact, isn't it true, Mr. Hill, that there (59) was no tax deficiency that had been yet arrived at during this period of time? Or, I mean, if you don't know—

A. I—let me put it this way: There were indications that there were.

Q. But there was nothing definite had been established?

A. Not as to a final amount.

Q. I see. Now, Mr. Waldin was not connected with your department?

A. He was not.

Q. And your department more or less works sort of independently of the deputies?

A. Oh, yes.

Q. The deputy collectors?

A. That is right.

Q. Your department is the more serious one where fraud is involved and you take it over?

A. That is right.

Q. And your files are kept where? Where were your files kept in 1949?

A. The intelligence files?

Q. Yes. I would say like a file of investigation of examining Dr. Mogavero, where would that be?

A. Well, the special agents' file would be kept in the Ayer Building at that time. The revenue agents' file would be up (60) in the Widener Building.

Q. Now, could Mr. Waldin as a deputy collector of revenue go into the Ayer Building and go to those files? I mean, could he have access to those files of your depart-

ment being he was a member of revenue and a deputy collector?

A. Oh, no. A deputy collector? No.

* * * * * * * * *

Redirect Examination

BY MR. SWOTES:

Q. Mr. Hill, just one question, sir.

A. Yes, surely.

Q. You were assigned to the case when, if you remember?

A. To the Waldin case?

Q. Yes, sir.

A. Well, that was on the 21st of September, 1949.

Q. Do you remember when you assigned the other special agents who assisted you?

A. To the best of my recollection, it could have been late that afternoon of the 21st or the following day, or the 22nd, perhaps not assigning him any duties in connection with the case on the 22nd until I had my talk with Dr. Mogavero.

* * * * * * * * *

BY THE COURT:

(61) Q. How did you happen to get to that conference on September 21, 1949? Turn toward the jury.

A. The special agent in charge, Mr. Fleming, asked me to accompany him, and at that time I didn't know what, why or—

THE COURT: Well, you answered my question.

THE WITNESS: And then with him I went up to Judge Clary's office.

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D. L. Tucker—Direct

DANIEL L. TUCKER, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SWOTES:

Q. Now, Mr. Tucker, would you state your occupation for us, please.

A. I am the chief of the intelligence division, Internal Revenue Service, Philadelphia District.

Q. And what area is within your jurisdiction?

A. The 23 Southeastern counties of Pennsylvania.

Q. And is the intelligence division today the same as it was as Mr. Hill described it?

A. With some changes, Mr. Swotes. The jurisdiction of the (62) intelligence division now does not extend to the investigation of what we refer to as charge cases—that is, misconduct cases on the part of employees. Our main duties now are the investigation of income-tax fraud cases.

Q. Now, what was your occupation in September and October of 1949?

A. I was a special agent assigned to Mr. Hill's group in the intelligence division, Philadelphia District.

Q. And did you co-operate with Mr. Hill in the investigation which he has just described?

A. I was assigned by Mr. Hill to assist him in that investigation.

Q. And would you tell us the first thing that you did in connection with that investigation and when you did it.

A. On or about the 22nd of September I was advised by Mr. Hill that I had been assigned to a case and should be on a stand-by basis for further instructions.

On October 5 I was instructed by Mr. Hill to accompany him to the Central-Penn Bank at 6th and Chestnut Street in Philadelphia. We arrived there at sometime in the morning, I think about ten o'clock in the morning, where we were met by Special Agent DiMaggio and Dr. Mogavero. We all—

Q. Is that the first time you had met Dr. Mogavero?

A. That is the first time I had met Dr. Mogavero. We then (63) adjourned to the safe-deposit vault of the bank and Dr. Mogavero removed from his brief case certain packages of currency which we counted, found it to be $20,000 there. We gave Dr. Mogavero a receipt, which I signed together with Agent DiMaggio and Mr. Hill, at which point the doctor left.

Q. Did you actually count each bill in the presence of the doctor?

A. We counted the bills by packages. They were wrapped by the bank with the denomination of the total amount on the outside of the wrapper.

Q. In other words, the bank had placed a band around each package indicating how much was there?

A. That is right.

Q. You relied on that to give the doctor his receipt?

A. Right.

Q. Did you then subsequently count the package or the amount of money?

A. We did.

Q. Bill by bill?

A. We counted each bill, prepared a list showing the serial numbers of the bills. Each of us initialed the list to show that we had checked the list, and we then wrapped the currency in a brown paper package, which was then placed together with the list of the bills and a copy of the receipt

we had given (64) Dr. Mogavero in a safety-deposit box which Mr. Hill had rented in his name at the bank.

Q. What did you do after that?

A. Right after that we went back to the office and prepared a dummy package of currency, made it up into a similar package as the one we had put the currency into, and it is my recollection that that package, that dummy package was delivered to Dr. Mogavero that afternoon.

Q. Why did you prepare a dummy package?

A. We prepared the dummy package for the doctor to carry around with him on his rounds the following day or the day that was set for this—

MR. DONOLOW: Objected to.

THE COURT: Well, the statement isn't what the doctor did with it. It is what the purpose was in handing the package to the doctor. I will overrule the objection.

THE WITNESS: We felt that if the doctor carried the actual currency on him a contact might be made with him on the street at which point he would have to pay, deliver the actual currency, so we prepared this dummy package for that purpose, to carry around with him.

BY MR. SWOTES:

Q. Who prepared the dummy package?

A. I prepared the dummy package.

(65) Q. And you say then that afterwards it was delivered to—

A. My understanding. I did not personally deliver it.

Q. That was on the 5th of October?

A. That is right.

Q. What day of the week was it; do you remember, Mr. Tucker?

A. That was a Wednesday, I believe.

Q. Now, what was the next thing that happened?

A. On the, I believe it was, the late afternoon of the next day, we were advised that there would be some action in the case the following morning, and together with Special Agent DiMaggio, the following morning—that is, the morning of the 7th—about nine o'clock Special Agent DiMaggio, myself, and Special Agent Morris went to the Central-Penn Bank. Special Agent DiMaggio left the car. We drove on and he went to the vault. He came back and handed me a package of currency that we had originally placed in the safety-deposit box.

We then drove to the doctor's—to Dr. Mogavero's office at 1311 South 15th Street. The three of us entered by the rear door through the alley. I believe we were all in—we went in at intervals, about five minutes. We were all in about twenty minutes of ten.

Q. Who took in the money?

A. Pardon?

Q. Who took in the money?

(66) A. I took in the money. That is my recollection, anyhow.

Q. Now, where were Lynn and Hill at this time?

A. It was my understanding that Agents Hill and Lynn were going to take up an observation point outside the front door of the doctor's office. I did not see them there at any time.

Q. You say you did not see them?

A. No, sir.

Q. Did they come to the doctor's office with you?

A. No, sir.

Q. And what did you do when you and DiMaggio and Morris entered the building?

A. We searched the premises, found only the doctor's mother in the building. We then looked over the situation. We then looked the situation over in general and we placed the package of currency in a waste paper basket alongside the doctor's desk in his consultation room.

Q. Now, would you describe the physical layout of the first floor of this building for us. I think perhaps it would be better to describe it as you enter from the front door.

A. Front door. It is a row house.

Q. May I ask you this, sir: It is on which side of 15th Street?

A. I have a drawing of it here, if will help, help the situation, Mr. Swotes.

(67) Q. Well, I wouldn't want to use it unless counsel would agree.

A. It is on the east side of 15th Street.

Q. Well, tell us—

THE COURT: Do you want to show it to Mr. Donolow? Maybe we can save some time if he would look it over.

BY MR. SWOTES:

Q. When did you make this drawing?

A. That was prepared by Mr. Hill, I believe.

Q. I wouldn't know whether it is right or wrong.

A. I would say it is not to scale, but it gives us the general—

Q. Well, I think you can describe it to us without too much diffienity.

A. It is approached by—it is a row house approached by a flight of two or three steps from the street, and as you—you enter a vestibule as you go in the front door and then go through the vestibule into a hall. On the right of the hall as you enter the stairs go upstairs. There is a narrow passageway leads right straight through to the dining room. To your left as you—

BY MR. DONOLOW:

Q. That is to the left of the hall, is it not, sir?

(68) A. The left of the hall.

BY MR. SWOFES:

Q. The stairs are on the right; the passageway is on the left?

A. That is right.

To your left as you stand in the passageway after going through the vestibule door there is the waiting room which is entered by the two French doors opening into the waiting room. Leading from the waiting room is a door going into the doctor's consultation room. There is another door in the back of the doctor's consultation room leading—there are two doors in the back of the doctor's consultation room. One leads into a small alleyway and the other leads into the dining room.

Q. It is correct, is it not, that the consultation room is in back of the waiting room?

A. That is right. Going through from the dining room there is a kitchen and then a small—I guess you would call it an outer kitchen or a shed.

Q. So that the consultation room is in back of the waiting room, the dining room is in back of the consultation room?

A. That is right.

Q. The kitchen is in back of the dining room?

A. Right.

(69) Q. The shed is in back of the kitchen?

A. Right.

Q. Going straight back on the left side as you walk in?

A. Now, there is going down this narrow hallway past the consultation room just to your left as you go into the dining room—there is a cellar door leading downstairs to the basement. To the right—I beg your pardon—the right of the passageway, the cellar door leads down into the basement.

Q. Would it be correct to say that the cellar door is underneath the stairs?

A. That is right.

Q. Now, you say that you placed the money in a wastebasket which was beside the doctor's desk?

A. That is right.

Q. Now, where is the desk located?

A. The desk is located on the left-hand side of the consultation room as you walk through to the back of the house.

Q. As you walk towards the back of the house?

A. Yes.

Q. And what did you do then?

A. Having placed the money in the waste paper basket, we sat in the dining room where we could keep our eye on the waste paper basket, and waited around until about twelve o'clock, at which time Dr. Mogavero came in.

(70) Q. Had anyone approached the house or rung the doorbell in the interval?

A. No, sir.

Q. And what happened when Dr. Mogavero came in?

A. We took the money out of the waste paper basket, put it into his brief case, relieved him of the dummy package of currency, which I placed down in the basement, and again we waited around until the doorbell rang sometime a few minutes before one o'clock, I believe it was, at which point Special Agent Morris took up his position on the top of the step leading to the second floor, Special Agent DiMaggio and myself took up our positions in the basement.

BY MR. DONOLOW:

Q. Where was that? I didn't hear it.

A. In the basement. We took our positions in the basement.

BY MR. SWOTES:

Q. What happened then?

A. We heard the door open. I heard the voice of Dr. Mogavero, and then we heard the two doors to the consultation room closed.

* * * * * * * * *

(71) Q. What happened, sir?

A. We heard the two doors to the consultation room close with a rather loud bang and Special Agent DiMaggio and I then came up the cellar stairs, took up a position outside the doorway leading from the consultation room into the dining room.

Q. Did you hear any conversations in the consultation room?

A. I didn't.

Q. Were you able to recognize any of the voices that you heard?

(72) A. Yes. I recognized one voice as being that of Dr. Mogavero.

Q. Did you hear another voice?

A. I did.

Q. Now, were you ever subsequently to determine whose voice that was?

A. I was.

Q. Will you tell us how you made that determination.

A. Some five minutes later we were talking to the defendant in the case.

Q. I didn't hear you, sir.

A. We were talking to the defendant in the case and I recognized the voice as being that of the defendant.

* * * * * * * * *

(73) Q. What was said between Dr. Mogavero and the defendant in that room?

A. I heard the voice of Dr. Mogavero say, "Well, here it is." I am speaking now from some years' memory, Mr. Swotes. They might not be the exact words, but I do have notes that I took at the time. Would you prefer me to give it as I recall it now or refresh my memory from my notes?

Q. Whichever is appropriate. If you feel your memory is refreshed now, you can do it without the notes, or if you would like to refresh your recollection by examining your notes as you testify, I think that would be proper also.

A. I heard the voice of Dr. Mogavero say, "Well, here it is. Here is the $20,000. Now, what do I get for it?"

(74) The other voice replied, "Don't worry. You will be shown everything."

Dr. Mogavero continued, "How do I know the whole thing isn't a fake? All along I have wanted you to bring Bill. How do I know I won't be indicted, anyhow?"

The other voice replied, "Don't worry. You will be shown the figures. Everything will be taken care of and you can forget about the indictment. At least I am sure I can guarantee you about the indictment. Those others wouldn't double-cross me."

Then the doctor said, "Well, here it is, two years' work. I am fed up with the whole damn business."

At that point we heard the handle to the door. I heard the handle to the door rattle and I moved back to my position by the consultation-room door to—behind the stairs.

Within a few seconds thereafter we heard the door to the other side of the office open and Special Agent DiMaggio and myself then proceeded down the narrow passageway, and as we approached the French doors leading to the waiting room the defendant came through them, and as we approached him I saw a package of currency—I saw a package thrown backward from his person and land on the floor just inside the French doors.

Q. How did you and Mr. DiMaggio come down the hall? Where (75) were you with reference to each other?

A. Mr. DiMaggio was in front of me.

Q. Now, were you armed at that time?

A. Yes, sir.

* * * * * * * * *

Q. Where was the weapon?

A. In my pocket.

* * * * * * * * *

Q. Now, what did you then do with Mr. Waldin as you approached him?

A. I picked up the package of—picked up the package. Mr. Waldin was placed against the wall of the hall-

way and searched by Special Agents Morris and DiMaggio and advised that he was under arrest after they had identified themselves as special agents of the intelligence division.

Q. Had Morris come down from upstairs?

A. Morris had come down from upstairs. After the doctor (76) closed both doors to his office Mr. Morris came down from upstairs and took up a position in the vestibule. He came from the vestibule to assist DiMaggio in searching Mr. Waldin.

Q. What if anything did you say to Mr. Waldin and what if anything did he say to you at that time?

* * * * * * * * *

THE WITNESS: I said nothing to Mr. Waldin, but as he was placed under arrest he nodded towards the package of currency I had just picked up from the floor and said, "What is this all about? I know nothing about this. For all I know the doctor owed my father some money and I was down here to collect it."

He made another voluntary comment to the effect that he had a lot of trouble, and he mentioned his mother had died—

MR. DONOLOW: What is that, Mr. Tucker? (77) I didn't hear that.

THE WITNESS: He mentioned that his mother had recently died, I believe, and also said something to the effect that his group supervisor would be very happy to see that he had gotten into a jam. Outside of that we had no conversation.

BY MR. SWOTES:

Q. What did you then do with him?

A. We took Mr. Waldin out the back way into our car, brought him down to the United States Commissioner's office. We swore out a complaint and a Commissioner's hearing was held.

Q. What conversations, if any, took place in the car or at any other time after the arrest?

A. None to my knowledge in the car. I was driving.

* * * * * * * * *

Cross-Examination

BY MR. DONOLOW:

Q. Now, Mr. Tucker, you at the request of Mr. Hill testified that you went to the Central-Penn Bank where some money was counted out and you took the numbers of the bills?

A. Yes, sir.

Q. Do you have that list with you?

A. No, sir.

Q. Pardon?

(78) A. I do not, Mr. Donolow.

Q. Was that the list? Was that the serial numbers of the bills that were in the package that you recovered?

A. Yes, sir.

Q. In other words, then, if we had those serial numbers that you have and the package of money that was recovered, they would be one and the same?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. Do you have the package of money—

A. I do not.

Q. —that was recovered?

A. I do not, sir.

MR. DONOLOW: Now, if Your Honor please, at this time I ask that all testimony relative to the money and the package be stricken from the record.

THE COURT: The motion is denied.

BY THE COURT:

Q. What happened to that list of the serial numbers?

A. The list of the serial numbers was Government's Exhibit G-6 in the previous trial. I have no knowledge of what happened to it, Judge.

MR. SWOTES: I might state, sir, for the record, (79) that I inquired from the clerk's office as to the whereabouts of the various exhibits in the last trial and I was told that they are not apparently in the custody of the clerk. The only thing we were given were the notes of testimony from the previous trial, which I have.

BY THE COURT:

Q. You say that the list corresponded to the numbers on the bills that were in the package after you picked it up?

A. Yes, sir.

Q. How do you know that?

A. We—when I picked the package of currency up from the floor I tore the package open in the corner to see whether the money was in it, and during the—prior to the original trial those numbers were checked pretty thoroughly against the list by myself, and during the trial itself we checked, I believe, five or six at random.

MR. DONOLOW: Well, if Your Honor pleases, I certainly object to anything that was done during the last trial, which, of course, was not binding on this

trial, there being a new indictment, a new indictment other than what the defendant was indicted for last time, although the evidence was the same. We would not be bound with whatever was set forth as evidence is concerned in the last trial—

THE COURT: That is very true.

(80) MR. DONOLOW: —and I think, sir, that the jury certainly has a right to see the money compared with this man's list. We have no way of testing his credibility. Now we are precluded again from attempting to compare the list with the money that was recovered. It is merely a conclusion on this witness's part and we have no other way of determining whether it is right or wrong.

THE COURT: You may argue that to the jury, if you wish.

BY MR. DONOLOW:

Q. Now, Mr. Tucker, you recovered this package, did you not?

A. Yes, sir.

Q. Did you take it down and dust it for fingerprints?

A. We did not, sir.

Q. What?

A. We did not.

Q. Why wasn't it dusted for fingerprints?

A. It is a question I can't answer, Mr. Donolow.

Q. Now, did you hear on this conversation that you alleged that you heard that was going on between Dr. Mogavero and the defendant—did you hear the defendant say, "I don't want any part of this?"

A. No, sir.

Q. I am reading from page 149. It says, "Look"—and this (81) is the defendant—"I don't want—I don't like any part of this." The defendant further stated, "He did say"—meaning Waldin—"he didn't want any part of this." Did you hear that in the conversation?

A. Is this the conversation I overheard in the doctor's office?

Q. Yes, sir, in the doctor's office.

A. Would it help you, Mr. Donolow, if I refer to the notes I took at the time?

MR. DONOLOW: You may. Sure.

* * * * * * * * *

Q. Mr. Tucker, would you answer my last question. Do you remember it?

A. I have here notes that I took—

Q. All right.

A. —contemporaneously with this happening. Shall I read them through, Mr. Donolow?

Q. Read your notes?

A. Yes, sir.

Q. No, no. I just want the answer to this question. (82) I said, did you hear the defendant say to Mogavero, "I don't like any parts of this. I don't want to have any parts of this?"

A. I didn't hear anything like that, Mr. Donolow. My notes contain nothing along those lines.

Q. Well, isn't it true, Mr. Tucker, that you missed some of this conversation while you were listening?

A. There was a brief pause, about two or three seconds' duration, between a couple of the comments made by the doctor. Whether anything was said or not, I couldn't say. If there was, I didn't hear it.

D. L. Tucker—Cross

Q. Well, now, you testified in this case on September 26, 1950, did you not?

A. Yes, sir.

Q. And these are your words—

MR. SWOTES: What page is that?

MR. DONOLOW: This is page 180.

BY MR. DONOLOW:

Q. Did you or did you not say this? "There was a reply which I did not catch." In other words, you say this. Let me start at the beginning so it will be fair with you.

"Then Dr. Mogavero's voice said, 'It is all very well, but how do I know the whole thing is not a fake? How do I know what I get for the $20,000? All along, I have (83) wanted you to bring Bill. How do I know I was never going to be indicted anyhow?'"

And then you went on to say:

"There was a reply which I did not catch," meaning a reply to the doctor's words—"There was a reply which I did not catch, in a low voice."

A. That is correct, Mr. Donolow. That is the position I am referring to.

Q. So that part of this conversation you did not get?

A. That is correct, sir.

Q. Now, you did not attend or you didn't hear any of the previous meetings between Dr. Mogavero, Mr. Waldin and Mr. Herskowitz, did you?

A. I did not, sir.

Q. And you never heard any of the conversations previous to this date that took place between Mr. Waldin and Dr. Mogavero?

A. May I have that question again?

Q. I say, you also did not hear, overhear any of the previous conversations to this date between Dr. Mogavero and Mr. Waldin?

A. I did not, sir.

Q. So that the only thing that you can testify is what took place this particular day?

(84) A. That is correct.

Q. And this testimony which you have given today you gave in 1950?

A. That is right, sir.

MR. DONOLOW: No further questions.

Redirect Examination

BY MR. SWOTES:

Q. Mr. Tucker, after the arrest of Mr. Waldin, did you search the premises?

A. We did, sir.

Q. What did you find?

A. There was nobody in the premises except Dr. Mogavero and his mother. We found nothing else, Mr. Swotes.

Q. Had you ever seen Mr. Waldin before?

A. No, sir. That is, not to my knowledge and recollection.

* * * * * * * * *

Recross-Examination

BY MR. DONOLOW:

Q. By the way, you had never met Mr. Waldin during your operations as an agent prior to this case?

A. Not to my knowledge, Mr. Donolow.

Q. And when you came up the hall after Mr. Waldin left the door, came through the two doors from the consultation room, you came running up the hallway in your bare feet, did you (85) not?

A. Stocking feet?

Q. I am sorry. I mean stocking feet. Is that correct?

A. Yes.

Q. You and Mr. DiMaggio?

A. Correct.

Q. And is it also true that Dr. Mogavero went out the back door, the back of the consultation room, into the dining room?

A. I believe that is correct.

Q. And then he came around the hallway, did he not?

A. That is right.

* * * * * * * * *

(86) MIRIAM B. MOGAVERO, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SWOTES:

* * * * * * * * *

Q. And Dr. Mogavero was your husband, was he not?

A. That is right.

Q. Now, did you ever meet the defendant, Mr. Waldin?

A. I met him September 15—it was on a Thursday—1949, about eleven o'clock. That was the first time I have ever met him.

Q. Was that eleven o'clock in the morning?

A. Yes.

Q. And where did the meeting take place?

A. Well, it was right in our breakfast room, which is right behind our dining room.

Q. At South 15th Street?

A. At 1311, yes, South 15th Street.

Q. And who was present at the time?

A. Well, the doctor's mother and doctor himself, and (87) Mr. Waldin and myself.

Q. Now, who was there first; do you remember?

A. Well, I suppose doctor. His mother lives there. Naturally she was there. We were all there, the three of us, outside of Ernie Waldin. He came in after we were there.

Q. And what conversations took place between Mr. Waldin and the doctor and yourself in your presence?

* * * * * * * * *

THE WITNESS: When he came in he was introduced to us as Ernie Waldin, and, as I said, it was the first time I (88) had seen him there, which I said to him—I said, "Ernie, what is all this about?" I said, "What is going on?"

And he said, "Well, they want money."

I said, "Well, what for and how much?"

He says, "Well, you will find out." He said, "There will be a call coming through," he said, and he said, "You will have to get rid of Mr. Herskowitz," he said. He said, "The group doesn't want him."

And I said something to the effect I didn't understand who he meant by the group, but he didn't tell me.

"The group doesn't want him. He is rough and he is crude. You will just have to get rid of him."

So we waited for the telephone call, which a call did come through, and my husband, Dr. Mogavero, answered the phone and—

BY MR. SWOTES:

Q. Now, Mrs. Mogavero, can you tell us where you were sitting and where was the telephone?

A. Well, I was in the breakfast room sitting right at the table—that is the breakfast room table—and the telephone has the wire which is right at the end of the dining room and breakfast room which has a French door between them, but the wire, the telephone itself is set on the server in the dining room, and the cord extends as far as—does reach over to (89) the breakfast room, and that was just about six feet away from where I was sitting.

Q. Now, when the telephone rang your husband answered the telephone?

A. He answered the telephone and he turned around and he said, "Ernie, this is for you."

Q. And then what happened?

A. Well, Ernie answered the phone and said, "Yes, Dr. Mogavero is here. I will get him on the phone."

I don't know what was said at the other end, but he turned and he said, "Doctor," he said, "this is Bill." He said, "He is on the phone and he wants to talk to you."

So my husband went to the telephone and—did you want to hear just what I heard from the other end?

Q. Well, let me ask you this preliminarily. Where was Mr. Waldin at the time your husband was on the phone?

A. Mr. Waldin was sitting across the table from me, which is also almost six feet away or seven at the most,

because the table is sort of round, and I was sitting on one side and he was sitting on the other side.

Q. Were you and Mr. Waldin and your mother-in-law talking?

A. Not while the conversation was going on, no, because we wanted to know what it was all about, and nobody was talking at the time doctor talked to this man on the phone.

(90) Q. And you could hear what the doctor said?

A. I could hear everything doctor said, because the rooms are just—are opened. It is a big French door, and both doors were open, and, as I said, it is only about six feet from where I was sitting.

Q. What did doctor say?

* * * * * * * * *

A. So my husband said, "Is this Bill?" And he said —well, he said, "You are the person I am supposed to talk to," and he said, "What is this all about?" he said, and he said, "20,000," my husband said. "That is an awful lot of money," (91) he said, "But what am I paying this $20,000 for?" He said, "I would like to know what I am paying it for." He said, "I will be glad to make a check," he said, "if you tell me what it is all about." He said, "If I owe anything," he said, "I am glad to give you a check," but my husband, after he waited a while, he said, "You want it in cash." He said, "Well, where are you going to get $20,000 in cash?" he said. He said, "I don't like this business," he said, "giving it in cash." He said, "What proof do I have," he said, "that I have even given it to you?" and, he said, "After all, he said, "when the Internal Revenue Department looks over my books and they are going to wonder what in the world did I do with this 20,000." And my husband said, "Gambling man?"

He said, "Now, look," he said, "you know I am not a gambling man." He said, "I never gambled in my life." He said, "That is no excuse." He said, "I could never tell them I gambled $20,000."

So again he said, "I think that that is too much money for not knowing what I am paying for," he said, "and have nothing to show for."

So as far as I can regall that was about the end of the conversation on the telephone.

Q. And then did your husband hang up?

A. He hung up and he came back and he said, "Ernie"—he said, "Ernie, I guess—"

* * * * * * * * * * *

(92) Q. Tell us what your husband said, Mrs. Mogavero.

A. Well, when he came back he said, "Ernie, I guess you know what they want." He said, "They want $20,000."

And Ernie just sort of nodded his head, and my husband says, "That is an awful lot of money." He said, "20,000—what am I giving it for?" he said. "I would like to know what it is all about."

And he said—well, he said, "That is the way the group wants it, and that is the way it has to be done."

(93) Q. Who said that?

A. Ernie Waldin said that to my husband, "That is the way they want it done."

And he said—then they said, "What will we do?"

So he said, well, he would give him until seven o'clock that evening.

Q. Who said that, Mrs. Mogavero?

A. Ernie Waldin. My husband said, "When does this have to be done and when is my time up?" Because he

seemed to be rushing it, and he said, "Till seven o'clock," that he was going to call my husband or either he was—either one had to get in touch with each other at seven o'clock and give a definite answer, and my husband says, "Well, I can't withdraw money from the bank at this late notice." He said, "It is too late," he said, "and you are not giving me any time."

So that was about the extent of the conversation that he had said at that time.

And I did then tell Mr. Waldin, I said, "Well, I think it is terrible," I said ,"when a person is asked to pay $20,000. You don't know what you are paying it for and you can't even pay it by check." They wanted bills, and I said, "I don't understand what it is all about." I said, "There is something wrong." I told that to Mr. Waldin himself.

(94) Q. Now, did Mr. Waldin make any suggestion to you about seeking some advice elsewhere?

A. Yes. He did.

Q. What did he say?

A. He said that he was going to—the group didn't want to have anything to do with Mr. Herskowitz, and that he was too rough and too crude, and

* * * * * * * * *

(95) Q. So what did Mr. Waldin say, Mrs. Mogavero?

A. He said, "You have a lot of friends at the hospital. Why don't you get in touch with them?" So we immediately did.

Q. And as a result of conversations that you had at the hospital, where did you then go after that?

A. From the hospital we went directly to Lawyer

Gibbons' office and Mr. Clary, who is now Judge Clary, and they took care of us from there on.

* * * * * * * * *

Cross-Examination

BY MR. DONOLOW:

Q. Mrs. Mogavero, you testified in this case in 1950 when he was on trial, did you not?

A. Yes.

Q. By the way, did you read your testimony prior to coming here today?

(96) A. Yes; I did, once.

Q. Who gave it to you?

A. Mr.—

Q. Swotes?

A. Swotes.

Q. He gave you this book of testimony to refresh your memory?

A. He didn't give it to me. He read it to me.

Q. He read it to you?

A. Yes.

Q. In the United States Attorney's office?

A. Yes. He did.

Q. All right. Then you have refreshed your memory as to your testimony; is that correct?

A. Yes, as far as I know.

Q. All right. Now, you did not partake in any conversation between your husband and Mr. Waldin prior to September 15?

A. No.

Q. You did not partake in any conversation between your husband, Mr. Herskowitz, and Mr. Waldin prior to the 15th?

A. No; I did not.

Q. Now, your only entry into this situation was that hour or so on September 15; is that correct?

A. That was right.

(97) Q. Now, when did you return that year from Guatemala; do you recall?

A. It must have been in the latter part of August, I believe.

Q. I see. That is right. You came back near the end of August?

A. That is right.

Q. Was Mr. Herskowitz in your home when you returned from Guatemala?

A. Not that I know of.

Q. I see. You wouldn't know whether he was downtown?

A. No. I would not. No.

Q. Now, was it discussed at this conference in your home on September 15 the fact that your husband was told by Dr. Squillace in a telegram that he was to be indicted?

A. Who?

Q. Dr. Squillace from downtown, the Squillace Brothers?

A. Yes.

Q. And wasn't it also discussed that—

A. Do you mean that they—that McDougal was down there?

Q. Yes.

A. No. It was not discussed.

Q. I am talking about the 15th.

A. No. It was not discussed as far as I remember.

Q. I am talking about the 15th now.

(98) A. As far as I remember.

Q. And wasn't it also—well, wasn't it discussed that a South Philadelphia politician had shown your husband a telegram and wanted money?

A. Well, Mr. Donolow, I did hear that that was all going on between Mr. Waldin and my husband, and so on, but I was not there when that was said.

Q. All right. You didn't hear whether it was said on that day or not?

A. No.

Q. All right.

A. I told you what I heard on September 15.

Q. All right. Now, up till September 15 your husband had not been informed, had he, that he owed any taxes?

A. Absolutely not. He was always asking, but nobody would ever tell him anything.

Q. I see.

A. He knew nothing.

Q. And when this conversation took place, Mrs. Mogavero, at your home on the 15th, as far as—I think you have so testified—as far as your husband was concerned, there was nothing wrong with his taxes?

A. As far as he knew, there wasn't anything wrong.

Q. As a matter of fact, you have testified he even reflected (99) that in his—when he was requested $20,000 he said he did nothing wrong, he sees no reason to pay it, didn't he?

A. He said, "If I have done anything," he told Mr. Waldin right there, "I have always offered to pay, but I want to pay by check so I know where it is going."

Q. I see.

A. "I do not want to pay in bills." He said, "I want something to show for it." He said, "I want something

to show for it if I owe anything," he said, "but please show me, if I owe it, if so."

Q. That is right. So that as far as your husband was concerned, as far as you were concerned, you weren't going to pay anything because there was nothing wrong with your taxes?

A. As far as we knew there was nothing wrong.

Q. That is right. Now, wasn't it also true that after this conversation took place on the telephone that Mr. Waldin said, "I do not want any part of this? Why don't you go to the hospital and see if they can do something for you?"

A. Yes. I think there was something said to that.

Q. Well, now, I am referring to page 385 of your notes of testimony on direct examination, and you said—this is what you have to say:

"'He said' meaning Waldin, 'I don't want any parts of it.'

He said, 'Why don't you go to the hospital and see if (100) they can do something for you?'"

A. Yes. There was.

Q. All right.

A. Remembering there was something said, because he—

Q. Well, did you say that, Mrs. Mogavero?

A. I beg your pardon?

Q. What I just quoted. Did you say what I just quoted?

A. Did I say it?

Q. Yes.

A. Now, just repeat what you said again.

Q. All right. I am referring to page 385 of your direct testimony in a hearing in 1950 in which you said:

"He said," referring to Waldin now—"he said, 'I don't want any parts of it.' He said, 'Why don't you go to the hospital and see if they can do something for you?' "

A. If I remember, I did say something to that effect.

Q. Not you, Waldin. Did Waldin say this?

A. To me?

Q. To everybody.

A. Well, yes, he did.

Q. All right.

A. Because—

Q. Now, didn't also Waldin—

THE COURT: Excuse me. She hasn't finished her (101) statement.

MR. DONOLOW: Oh, I am sorry.

THE COURT: Do you wish to finish it?

THE WITNESS: It slipped my mind, what I was going to say. Well, he was so indifferent about Mr. Herskowitz and—

MR. DONOLOW: I am not—

THE WITNESS: And then he asked us to get some other advice or to—that he—

BY MR. DONOLOW:

Q. In other words, he had told your husband after that conversation to go to the hospital authorities and see what they could do for him—

A. Yes.

Q. —is that correct?

A. Yes.

Q. As a matter of fact, did he also say to your husband, "Seek counsel elsewhere?"

A. He said, "You have friends out at the hospital. Why don't you go to see them?"

Q. That is right.

A. Something to that effect.

Q. And, as a matter of fact, your husband followed that advice and as a result of going to the hospital authorities (102) that is how he came to Mr. Gibbons and Mr. Clary; isn't that so?

A. Yes. That is true.

* * * * * * * * *

JOSEPH DiMAGGIO, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SWOTES:

* * * * * * * * *

(103) Q. Now, what was your occupation in September and October of 1949?

A. During those months I was a special agent attached to the Philadelphia intelligence division which was then located in the Ayer Building.

Q. Who is your immediate supervisor?

A. Well, during that period I was detailed to the group which was supervised by Special Agent Edward A. Hill.

Q. Is he the gentleman who testified earlier this afternoon?

A. Yes. He is.

Q. And did there come a time that you were assigned by your group chief, Mr. Hill, to investigate the Waldin matter?

which Dr. Mogavero withdrew a sum of money. From there we went to the Western Savings Fund Society—

Q. Could I interrupt you for one second, sir? Were you subsequently able to ascertain the amount that Dr. Mogavero withdrew?

A. Yes. We were.

(105) Q. And how did you ascertain it?

A. Well, we had the—the money was turned over to us by Dr. Mogavero later that morning at the Central-Penn National Bank, and we determined from the bank wrappers the amount of money contained in each of those wrappers and the amount, of course, which we obtained—which he had obtained from the—each of the banks.

Q. And you counted the money—

A. Yes.

Q. —later, did you not?

A. Yes.

Q. And how much money did he take out from the Beneficial Savings Fund?

A. I believe it was $6000.

Q. Where did you go from there?

A. From there we went to the Western Savings Fund Society, which was then located at 10th and Walnut Street in Philadelphia, and from which bank he withdrew the sum of $7000.

Q. You ascertained subsequently—

A. In the same fashion.

Q. —it was $7000, the same way?

(No response.) —

Q. And then where did you go?

(106) A. From there we went to the Philadelphia Saving Fund Society Bank located at 7th and Walnut

Streets, and again Dr. Mogavero withdrew the sum, $7000 there. That was determined later when we count the money.

Q. Where did you and Dr. Mogavero go from there?

A. From there we went to the Central-Penn National Bank located at 7th and Chestnut Streets.

Q. And what did you do there?

A. We met with Special Agent Edward A. Hill and Special Agent Tucker outside the bank. We entered the bank and went to the vault area where we checked the wrappers on the bills, gave Dr. Mogavero a receipt, whereupon he left, and we sat down and counted the money. In addition to counting it, Special Agent Tucker recorded the serial numbers of the notes as I read the numbers off to him.

Q. Then what did you do?

A. The currency was then placed in a brown package, placed in the vault, in the safety-deposit box, with the serial numbers, which had been initialed. The sheet, of course, had been initialed by Special Agent Tucker, Hill and myself, and we then left, returned to the Ayer Building. At the Ayer Building we had a briefing session later that afternoon.

BY THE COURT:

Q. Whose safety-deposit box was this?

(107) A. It was rented by Special Agent Hill and my name and his name was on the access card.

BY MR. SWOTES:

Q. Mr. DiMaggio, what did this package look like that you made up?

A. Well, it was the same width and length of an ordinary United States note, dollar bill or $10 bill, and I

would say about approximately three inches high, between two and a half to three inches high.

Q. And how was it wrapped?

A. It was wrapped with brown paper. I believe it was Scotch-taped.

Q. What was the next thing that was done?

A. We held our briefing session that day on a Wednesday afternoon of October 5, and we sat tight until the following day when Special Agent Hill informed us to be at the doctor's downtown office the following day.

Q. And did you go to the doctor's downtown office the following day?

A. Yes. We did. Prior to that time I might say that we went to the Central-Penn National Bank to take the $20,000 out of the safe-deposit box.

Q. Now, who is "we" when you say "we?"

A. Special Agent Morris and myself. I entered the bank and (108) took the money out, met Special Agents Tucker and Morris, and from there we went to the area of 15th and Wharton Streets where we parked our car, and Special Agents Morris, Tucker and myself entered the premises at 1311 South 15th Street through the rear, through the rear door.

Q. How did you enter, together or separately?

A. No. We entered separately. I would say a few minutes apart.

Q. What did you do when you got in the building?

A. We got in and the first thing we did, of course, was, after greeting the doctor's mother, was to search the building to determine that there was no one other than the doctor's mother on the premises.

Q. And then what did you do?

A. We then took the package containing the $20,000 and placed it in a waste paper basket inside the doctor's consultation room. We sat in the dining room, as I recall, where we could keep an eye on the package and waited the doctor's arrival.

Q. What time did the doctor arrive?

A. I will say at approximately twelve o'clock noon he arrived.

Q. What did you do then?

A. We took the package. I don't know whether Special Agent (109) Tucker or myself took the package from the waste paper basket and gave that to the doctor at the same time that the doctor gave us the dummy package.

Q. Where had he had the dummy package?

A. That was in his brief case, or some sort of a case which he carried. He gave us the dummy package which Special Agent Tucker then took down to the basement and kept down there, kept out of the way. The package containing the money was placed by the doctor in this brief case.

Q. Now, who arrived after that?

A. Well, I am not sure. There was—there was someone that came to the door, I recall that distinctly, which caused Special Agent Tucker and me to scurry down the cellar stairs. It was a trashman of some sort who did not enter the house, a trashman, a mailman or something. I don't know whether that was after Mogavero entered the premises or before. It was sometime that morning.

Q. And did the defendant ultimately arrive?

A. Well, I will say that at approximately one o'clock someone did ring the doorbell and someone did enter. At that time, of course, I did not know the defendant.

Q. Well, what happened when that someone rang the doorbell and entered?

A. At that point Special Agent Tucker and I went down the (110) cellar steps, as arranged. Special Agent Morris took up his position on the second floor, and we waited until the—we heard the two doors to the doctor's consultation room close, at which point both Special Agent Tucker and I ascended the stairs and took up a position right alongside the door leading from the doctor's consultation room to the dining room.

Q. Were you able to hear certain conversations going on in the doctor's consultation room?

A. Yes. The first thing I heard—

Q. Well, now, before you go into that, let us attempt to establish who you heard.

A. Well, one of the voices I recognized, having heard it before, was the voice of Dr. Mogavero.

Q. Was there another voice?

A. There was another voice; yes, sir.

Q. And were you able to subsequently determine whose voice that was?

A. Yes. I was.

Q. Now, how were you able to make that determination?

A. Well, I would say five or ten minutes later I spoke to the defendant, Ernest Waldin, and recognized his voice as the voice I heard talking with the doctor.

Q. And what did Mr. Waldin and the doctor say to each other?

(111) A. Well, the first thing I heard was the doctor saying, "Here is your damn money. Here is the $20,000, just like you wanted it. Now, what do I get for it?"

Then Mr. Waldin replied that he would be shown the figures, everything would be taken care of, there was nothing to worry about, and the doctor then in an extremely loud voice, I recall, practically yelled that he had wanted Bill to come down there and thought perhaps that the whole thing might be a fake, at which point he added that he didn't know but what he might be indicted anyhow, and Waldin assured him that he didn't think that would happen, he shouldn't worry about it, and the doctor was pressed with the fear that he might be double-crossed, and Waldin assured him that he didn't think that they would double-cross him.

That was about the gist of the conversation, except, as Mr. Tucker has testified, I, too, did not hear the entire conversation, all but I would say a fraction of two or three seconds, perhaps, where Waldin spoke in a very low voice.

Q. And then what happened?

A. The doctor at that point, as I recall, said, "Well, you have got the money," he is fed up with the whole damn business, and that was the end of that. The conversation ended and I saw the door open from the doctor's consultation room to the dining room, later we heard the other door open into the (112) waiting room, and, of course, at that point Tucker and I had crossed the passageway and we were in the area of the cellar, cellar door.

Q. Cellar stairs, cellar door?

A. Cellar stairs, at the top of them. I can recall looking around the corner of the passageway and watching for someone to emerge, and as the defendant came to the door he turned slightly at that door. We walked down the areaway and identified ourselves as special agents of the intelligence division and placed him under arrest. I might

say this, that with respect to the—with respect to a package, I did see a package leave his hand.

Q. You did see a package—

A. Yes.

Q. —leave his hand?

A. Yes.

Q. How would you describe the package that left his hand?

MR. DONOLOW: Well, if Your Honor pleases, at this point I again interject that objection I had previously that the package is not here and the government does not have it as evidence. Any testimony relative thereto should be stricken.

THE COURT: The motion is overruled or the motion to strike is denied.

(113) MR. DONOLOW: And put on the record that any further evidence containing or referring to the package from here on in is objected to on the same grounds.

THE COURT: The objection is overruled.

BY MR. SWOTES:

Q. Now you say you saw a package leave his hand?

A. Yes.

Q. And what do you mean by, "leave his hand?" Would you amplify that for us.

A. Well, I will say this: The reason I say, "Leave his hand"—I cannot say that I actually saw him remove a package from his pocket. I did see it leave his hand and land on the floor within the doorway in the waiting room. That was the package which I saw Special Agent Tucker subsequently retrieve, open, and initial after he had—

Q. What was in the package?

A. I saw currency, currency in the package.

Q. Was it a different package than the one which you had—

A. No, no. It was checked by Special Agent Tucker at the time and it was the currency which we had placed in that package.

Q. Currency which you had placed in the doctor's brief case?

A. Yes. Well, it was the package which we had placed.

Q. Oh, excuse me. The package which he had was the package (114) that he had in the brief case?

A. Yes. That is right.

BY THE COURT:

Q. Were you there when Tucker did his checking?

A. Yes. I was right there, sir. I saw him tear the corner of the package and initialed it at that time.

BY MR. SWOTES:

Q. Where was Morris?

A. Special Agent Morris, as we came from the dining room area, Special Agent Morris opened the vestibule door leading into the doorway and came from that area.

Q. And what conversations, if any, were had between the agents and the defendant at the time that you placed him under arrest?

A. I can recall Mr. Waldin saying that he didn't know what was in the package, that the doctor owed his father some money and he just came there to collect it.

Q. What did you do? Did he say anything else?

A. Well, yes. I can recall him sitting on the stairs while we were still there and saying that he had sort of

hit a run of hard luck—first his mother had died only recently, and now this, and also that his group chief would probably be happy to hear about the trouble he was in.

Q. And what did you do then?

(115) A. Well, we then took him out of the house and to the office of the United States Attorney where Special Agent Tucker, I believe, signed a complaint. He was arraigned before the United States Commissioner that afternoon.

Q. Now, where did you say you took him, to the United States Attorney?

A. The office of the United States Attorney here in Philadelphia.

Q. Now, how did you get from the doctor's office to the United States Attorney's office?

A. Placed him in our car and we proceeded there by automobile.

Q. Now, were there any conversations in the automobile between yourselves and the defendant?

A. None, none that I can recall.

* * * * * * * * *

Cross-Examination

BY MR. DONOLOW:

Q. Mr. DiMaggio, you testified in this case in 1950, did you not?

A. Yes. I did.

Q. The same testimony you are giving now you gave then?

A. Substantially; yes, sir.

Q. Now, you were brought into the case after September 15, were you not?

(116) A. Yes. I was.

Q. And your assignment was as a result of a meeting between Mr. Hill, your chief, Mr. Clary, Mr. Gibbons and Dr. Mogavero; is that correct?

A. Well, I didn't know that at the time of my assignment. I have learned that subsequently; yes.

Q. The special agents got into the case after that meeting?

A. Yes. That is correct.

Q. All rig't. Now, you and Mr. Tucker then with Dr. Mogavero got the money together, the $20,000; is that correct?

A. That is correct.

Q. You made up the package?

A. No. Mr. Hill made up the actual package.

Q. Mr. Hill made up the actual package?

A. Yes.

Q. He is a member of the revenue?

A. Yes. That is right.

Q. Mr. Hill was there. He also made up the dummy package?

A. I think Special Agent Tucker did that.

Q. All right. You or Mr. Tucker then delivered the package direct to Dr. Mogavero's home?

A. No. I don't know that of my own knowledge. I did hear it was delivered to the doctor.

Q. I see. And who placed the money package in the waste (117) paper basket?

A. Well, either Special Agent Tucker or I. I don't know.

Q. But it was somebody?

A. Yes. It was one of us.

Q. Connected with the revenue?

A. One of us; yes, sir.

Q. And then you took the other package that Dr. Mogavero had; is that correct?

A. That is correct.

Q. You had instructed Dr. Mogavero how he was to act in the room?

A. Yes.

Q. Dr. Mogavero knew when he spoke to Waldin in his home in October that you people were outside?

A. Yes, sir. He did.

Q. And that you people were overhearing the conversation?

A. Yes. He did.

Q. And he also knew that the idea was for you people to apprehend Waldin, didn't he?

A. Yes, if a crime was committed.

Q. Yes. That is right. In other words, this had all been set up previously or the arrangements had been set up by the department previously with Dr. Mogavero, previous to this October meeting and after September 15?

(118) A. The plans.

Q. Yes.

A. The plans were made by us; yes. That is correct.

Q. Now, you never overheard any of the conversations that took place between Dr. Mogavero, Mr. Waldin and Mr. Herskowitz, did you?

A. No; I did not.

Q. And you did not overhear any of the conversation which took place between Dr. Mogavero and Mr. Waldin from September 15 on to the time that you apprehended Mr. Waldin in Dr. Mogavero's home?

A. No, other than the conversation of October 7, I did not.

Q. And anything leading up to that you did not hear?

A. That is correct.

Q. And you don't know of your own knowledge from overhearing at whose invitation Mr. Waldin came to Dr. Mogavero's home? You didn't overhear the conversation—

A. Except—well—

Q. —between Mr. Waldin and Dr. Mogavero, did you?

A. No; I did not hear at whose invitation Mr. Waldin was there,—

Q. All right.

A. —other than what I have testified to as to the beginning of the conversation.

(119) Q. Yes; but you don't know whose invitation brought Mr. Waldin down?

A. No.

Q. Did you hear Mr. Waldin say to Dr. Mogavero, "I don't want any part of this," on the 15th?

A. No. I am certain I did not hear that.

Q. Of course, some of the conversation you testified to you didn't hear; it was so low; some of the conversation on the part of Mr. Waldin was so low you didn't hear it?

A. Well, I would say I missed the conversation that would have taken not more than two or three seconds.

Q. Now, when Mr. Waldin walked out of Dr. Mogavero's consultation room into the waiting room, he was looking back over his shoulder, was he not?

A. That is correct.

Q. And he was looking back over his shoulder towards the consultation room?

A. Well, I don't know exactly where, but his head was turned in the direction of the consultation room or the passageway—

Q. That is right.

A. —looking into the dining room.

Q. Right; and then you and Mr. Tucker came up in your stocking feet along the hall?

A. Yes. That is right.

(120) Q. And that is when you say he threw the package?

A. That is right.

Q. When you ran up behind him?

A. Exactly.

Q. Had you known Mr. Waldin before?

A. No. I had never seen him before.

Q. And this was the first time you two had met?

A. Yes.

* * * * * * * * * *

BY THE COURT:

Q. Well, now, wait a minute. Mr. Donolow said something about throwing a package. Will you describe exactly how this package of money left Mr. Waldin's hand.

A. Yes. I could recall seeing the thing. I could describe it as a downward motion, leave his hand to the rear of his body.

Q. Who was Mr. Waldin's group chief at that time, if you know?

A. The name is Landau, I believe.

THE COURT: That is all.

Redirect Examination

BY MR. SWOTES:

Q. May I just ask you one thing along the lines of the (121) question Judge Grim just asked you? You say it was a downward-backward motion?

A. Yes.

Q. Did he drop it, just drop it straight down?

A. I would say it was more of a throw than a drop.

Q. In other words, when the package ended up it was in back of him; it wasn't beside him?

A. That is right. It was slightly to the rear of him.

* * * * * * * * *

(158) ERNEST T. WALDIN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. DONOLOW:

Q. Mr. Waldin, I am going to, when I question you, I am going to ask you to answer questions as of the year 1949 so that we will have no discrepancy. I know it is a period of seven years, but see if you can answer as to these things in 1949.

How old were you, Mr. Waldin, in 1949?

A. 31.

Q. And what was your position at that time?

A. I was a zone deputy collector in internal revenue.

Q. Now, when were you appointed to the Revenue Department?

A. It was in January of 1941.

Q. And how long were you with the department?

A. Nine years.

Q. Now, did you have any interruption in that nine-year period?

A. I was in the army two years.

Q. And in what year did you go away into the army?

(159) A. April of 1944.

Q. And you returned—

A. Just two years later, the same month.

Q. Now, as a zone deputy collector—I am referring now to the year 1949—what was your function?

A. Well, our job was to collect delinquent taxes mainly.

Q. And where were you assigned? What was your zone?

A. Well, my district was north of Poplar Street to Lehigh Avenue, west of Broad to the river, Schuylkill River.

Q. In other words, am I right by saying that every deputy collector had a zone?

A. Yes. They all had their own sections.

Q. And your function as a zone deputy collector would be limited to that zone?

A. That is right. Yes.

Q. Now, prior to April of 1949 had you known Mr. Herskowitz, the attorney?

A. Well, I knew Mr. Herskowitz for about—well, since I was about fourteen, fifteen years old.

Q. I see. And prior to April of 1949, had you known Dr. Mogavero?

A. No. I didn't know Dr. Mogavero.

Q. Now, as a zone deputy collector did you have any access to the files or records of the revenue agents in the Widener (160) Building?

A. No, sir; I did not.

Q. Where was your office located?

A. Right here in this building on the 11th floor of the Gimbel Building.

Q. Did you have any access to the records or files of the special agents?

A. No, sir.

Q. Where were they located?

A. Well, they were in the Ayer Building.

Q. Now, at any time in 1949 or prior or any time prior since you were an agent, did you ever have assigned to you any case dealing with Dr. Mogavero?

A. No, sir; I did not.

Q. Now, in April of 1949 did you receive a call from Mr. Herskowitz?

A. Yes, sir; I did. He called—

Q. And what was the nature of that call?

A. Well, he called me at my office, 11th floor of the Gimbel Building.

Q. Will you speak louder.

A. He called me at my office, 11th floor of the Gimbel Building, and asked me to stop up to see him, he had something he would like to talk to me about. So I went up there around (161) noontime.

Q. Now, let us stop there. Did he tell you when he called you what he had to talk to you about?

A. No. He did not.

Q. Now, did you then go up to his office?

A. Yes. I did. I went up around noontime.

Q. Noontime?

A. That is right.

Q. And then what did you do?

A. Well, he told me in his office he wanted me to meet a good friend of his and a client and he would like me to go up with him at that time to meet him, and we went downstairs on 1420 Walnut Street where Herskowitz' office was, to 19th and Chestnut by cab, and he took me up to meet Dr. Mogavero. It was the first I had met him.

Q. Now, when he introduced you to Dr. Mogavero, Mr. Herskowitz, how did he introduce you?

A. Well, he introduced me as Ernie Waldin.

Q. In your presence did he tell Dr. Mogavero who you were?

A. No. He did not.

Q. At this point in talking to Dr. Mogavero did you ever tell Dr. Mogavero who you were? I mean, as far as your business connections.

A. No, sir. I did not.

(162) Q. All right. Now, you met Dr. Mogavero. And then what happened?

A. Well, Dr. Mogavero told me that he was being investigated by the agents and by the special agents, that he was called down for an interview, and what was really bothering him was a couple attorney friends of his had—

Q. Was that "attorney" or—

A. Doctor friends of his introduced him to this Philadelphia politician, and they showed him a telegram, said he was going to be indicted, and that the doctor told me it was bothering him very much.

Q. Now, did he at that time mention to you who the South Philadelphia politician was?

A. No. He never mentioned his name. He was evasive on that.

Q. You later did find out, did you not?

A. I found out in this courtroom here.

Q. Yes.

A. In 1950.

Q. Now, then, what did you say to him?

A. Well, I told the doctor the internal revenue

doesn't operate that way, that the telegram must be a fake, and the doctor was glad to hear it, and he thanked me.

Q. Now, so that we understand, then, the main purpose of your going to Dr. Mogavero's office was to determine whether (163) this telegram was true or not?

A. That is right.

Q. Now, then what happened? When was the next contact?

THE COURT: May I make something clear here? Was this telegram to this alleged South Philadelphia politician or from this South Philadelphia politician?

THE WITNESS: That I don't know, Your Honor. I understand the telegram was sent from Washington and this South Philadelphia politician had it, and it was stating that Dr. Mogavero was to be indicted. That is all he told me about it.

BY MR. DONOLOW:

Q. That was what Mr. Herskowitz testified here yesterday?

A. Yes, sir.

Q. Or was told when he was in the room?

(No response.)

Q. Now, that was the extent of the conversation when you told him it was a fake; is that correct?

A. That is right.

Q. Now, after you left did you hear from Mr. Herskowitz after that?

A. Mr. Herskowitz called me quite often for two or three months.

Q. And what did he want?

(164) A. Well, he wanted to be assured that the telegram was a fake, and I assured him it was, that the internal revenue doesn't operate that way.

Q. And did he also inquire from you whether you could get him information, if you recall?

A. Well, I don't remember getting any information—

Q. No. I say, did he inquire from you whether you could get him information in reference to Dr. Mogavero's examination?

A. I told him I had nothing to do with that.

Q. I say, did he ask you?

A. Oh, yes; he did.

Q. So that in the two or three months' period that he called you, he asked you for information?

A. That is right.

Q. And what did you tell him?

A. I told him I had nothing to do with that, the intelligence division, or the Widener Building, the agents.

Q. But you reassured him that there was nothing—

A. Well, I knew that, that the internal revenue wouldn't operate that way, by sending telegrams.

Q. Now, when was the next contact that you had with Dr. Mogavero?

A. He called me on the 13th of September.

Q. No. I mean before that. Did you meet him professionally?

(165) A. Oh, yes, on my mother. I asked him for his advice, and he got me a—

Q. When was this?

A. Oh, this was in July.

Q. Of what year?

A. 1949.

Q. And what happened?

A. Well, my mother had a heart trouble and I went to Dr. Mogavero for a specialist, a heart specialist, and he recommended me a doctor. In fact, I had her in the Misericordia Hospital and he took good care of her there.

Q. I see. Then after this trouble you had with the problem with your mother in July of 1949, did you meet Dr. Mogavero again?

A. Only once he called at my home on Race Street where I was living at the time. That was on the 13th of September he called me.

Q. And what did he say?

A. And I got the message that night when I got home, and I called him the next day at his office on 19th Street, and he asked me if I would come up to see him.

Q. At his office?

A. At his office on 19th Street, and I went up that afternoon.

(166) Q. That was on the 14th of September?

A. That is right.

Q. And who was there?

A. Well, I went up that afternoon and I noticed he was very busy, and I just met Dr. Mogavero. He said he was very busy and he said he would like me if I would stop down to his South 15th Street office tomorrow, which would have been the 15th, and I told him I would be down around noontime.

Q. Well, did you have a conversation with him?

A. Well, he—I asked him how he was coming along with his tax problem. He said he wasn't doing too good, he wasn't getting enough information, and that he wasn't too satisfied with Herskowitz.

Q. He said he wasn't what?

A. Too satisfied with Mr. Herskowitz. And I told him, "Well, maybe you should get a tax attorney."

Q. You suggested for him to get a tax attorney?

A. That is right.

Q. Now, what time was this?

A. This was around noontime.

Q. And were you working at that time?

A. Well, I was probably on my lunch hour. It was at noontime.

Q. Now, did you then go down to Dr. Mogavero's home the (167) next day on the 15th?

A. Yes, sir; I did.

Q. And where was that located?

A. It is on South 15th Street, I think, around Wharton.

Q. And who greeted you when you—

A. Well, Dr. Mogavero at the door and—

Q. You will have to talk louder. I can't hear you.

A. I say Dr. Mogavero opened the door and let me in himself.

Q. But Mogavero opened the door and let you in?

A. Yes.

Q. Keep your voice up. Maybe I am drowning you out. I don't know. Now, did you have any conversation with Dr. Mogavero?

A. Well, we was walking through the hall towards this kitchen—

Q. Where is that kitchen located?

A. In the back of the house. We had to walk through the hallway.

Q. I see.

A. And he told me he was expecting this call from the politician and he would like me if I would talk with him, so I would give him advice, meaning himself.

Q. Well, he said that he—was this the same politician that he had told you about on the previous meeting?

A. I assumed it was; yes, sir.

(168) Q. Did he tell you at that time that the politician was Michael Tenit?

A. He never mentioned his name to me.

Q. I see. All right. So then what happened?

A. So we went back to the kitchen, and I met Mrs. Mogavero and his mother, and we sat at the kitchen table, and a call came through in a little while, and the doctor answered it, and he talked a while.

He said, "Look, talk to this man for me."

Then I got on the phone and the man mentioned something about fixing the doctor's tax. So I stopped him right there. I said, "Dr. Mogavero, you talk to this man."

And I went back into the kitchen and I sat down with Mrs. Mogavero, and we were talking at the table. The doctor talked to this party for about, oh, I guess five or ten minutes, and he came back into the kitchen and he says, "Ernie, they want $20,000 to fix my case."

And I got up. I told the doctor not to pay the $20,000, and Mrs. Mogavero agreed with me. I told him—I says, "I think you should go to the hospital authorities; I am sure they could help you," and I started to go out.

Q. Now, it was at your suggestion, then, as was testified here by Mrs. Mogavero yesterday, that he should go to the hospital authorities; maybe they could help him in his taxes?

(169) A. That is right.

Q. Is that what you meant?

A. That is right.

Q. Now, when you were walking out did anybody walk out with you?

A. Dr. Mogavero walked out the hall with me.

Q. To the door?

A. To the front door.

Q. Yes. He accompanied you?

A. Yes. He said, "Aren't you being a little ungrateful? I gave you help when you wanted it, and why don't you help me?"

I said, "I don't want any parts of it," and I went out the door.

Q. You said you don't want any parts of it and then you walked out the door?

A. Yes, sir.

Q. When was the next time you heard from Dr. Mogavero?

A. He called at my house before I went to work one morning. It was on the 4th of October. He called me and—

Q. Who took the call?

A. My uncle, Fred. He was living with me at that time there. The full name was Frederick Gall.

Q. Now, who was living in your home at that time?

A. Well, my uncle was living with me and my niece off and (170) on after my mother died.

Q. When did your mother pass on?

A. In August of 1949.

Q. That was a month after she went to the hospital?

A. That is right.

Q. Now, you got a call from the doctor on the 14th? Did you call him back? Or did you say the 13th?

A. 4th of October he called.

Q. 4th of October. I am sorry. Now, did you call him back? Did you call the doctor back?

A. I called him. I talked to him in the morning on the phone.

Q. Oh, when he called?

A. That is right.

Q. The same morning?

A. Dr.—my uncle Fred got on the phone and said, Dr. Mogavero wanted to speak to me, was on the phone, and he asked me to stop down to meet a Mr. Gibbons; he is a hospital attorney and he expects him to close the case out at the end of the week.

Q. Close what case?

A. The doctor's case.

Q. Now, when he said, "Mr. Gibbons," did he mean Walter Gibbons, the attorney for Misericordia?

A. Yes, sir. So I told him—

(171) Q. Mr. Walter Gibbons, do you know, was in the same law office with Mr. Clary; is that correct?

A. That is right.

Q. And he asked you to come down to meet Mr. Gibbons at his home; he is going to close the case?

A. That is right.

Q. Now, did he tell you for what purpose he wanted you to come down?

A. He told me to come down so I could advise him. He says that he will be there Friday, and I told him I could be down there at one o'clock if Mr. Gibbons will be there.

Q. All right. Had you spoken to Dr. Mogavero from September 15 to October 4?

A. No, sir; I did not.

Q. All right. Now, did you then go down on October 7?

A. Yes, sir; I did.

Q. And who let you in?

A. His mother let me in.

BY THE COURT:

Q. Down where?

A. South 15th Street, the doctor's home.

Q. Dr. Mogavero's office?

A. Dr. Mogavero's office; yes, sir.

BY MR. DONOLOW:

(172) Q. Now, when you walked in where was Dr. Mogavero with reference to the waiting room?

A. Well, I went in—

THE COURT: Well, just a minute. Was it Dr. Mogavero who said that you should go to Walter Gibbons' office?

MR. DONOLOW: No.

BY MR. DONOLOW:

Q. Suppose you clear the Judge up.

A. No. He was supposed to have Mr. Gibbons at his South Philadelphia office at South 15th Street this Friday, October 7.

THE COURT: So he said, "Come—"

THE WITNESS: Yes, sir.

THE COURT: "—to my office October 7?"

THE WITNESS: That is right.

THE COURT: That Mr. Gibbons will be there.

THE WITNESS: That is right.

THE COURT: Oh, I misunderstood.

BY MR. DONOLOW:

Q. And, of course, to refresh that, you testified he was going to close the case at the end of the week?

A. That is what he said.

Q. Now, you were at a point where you walked into the doctor's house on the 7th, and I asked you where the doctor (173) was standing in reference to the waiting room.

A. He was standing in—on a doorway of his reception room, and his waiting room, his private office, I guess you would call it, that was directly in back of his reception room.

Q. I see. Now, how far in was he standing from the reception room?

A. Well, maybe a yard.

Q. What?

A. Probably about a yard, I guess.

Q. Inside toward—

A. Inside.

Q. —the reception room?

A. Private office.

Q. Or towards his private office?

A. In his private office.

Q. I see.

A. And I asked him where Mr. Gibbons was. He said, "Mr. Gibbons couldn't be here, but," he said, "I have something I would like to discuss with you," and he went into his private office.

Q. Did he shut the door?

A. I went in with him and he closed the door, closed both doors?

Q. What did he say?

(174) A. Dr. Mogavero said that—he picked a package off his desk. He said, "There is $20,000 in here." He says, "I am going to give it to them so I won't be indicted."

I says, "Did they show you any figures?"

He says, "No. They did not."

I asked him if they guaranteed him anything.

He said, "No, and I don't know if it is a fake or not."

I told the doctor—I said—

Q. Now, this is the exact conversation which was testified to here yesterday by the special agents, what they heard; is that correct?

A. Yes.

MR. SWOTES: If Your Honor please, that is leading, and I don't think it is correct from the record.

MR. DONOLOW: All right.

MR. SWOTES: Because that isn't what the special agents said at all.

MR. DONOLOW: All right.

THE COURT: It is for the jury to say.

MR. DONOLOW: All right.

BY MR. DONOLOW:

Q. Then you asked him whether ~~they had~~ guaranteed him anything; is that correct?

(175) A. That is right.

Q. When he said, "I am going to give them $20,000," what did you believe he meant?

A. Well, I assumed he meant this politician who was calling him.

Q. That was the same one he was talking about in your previous visits?

A. That is right.

Q. Now, how were you talking, in a normal low tone?

A. I was talking in a normal tone; yes.

Q. The way you are talking here or are you talking loud here?

A. Well, just talking normal in a small office.

Q. And, now, how did Dr. Mogavero speak?

A. He was talking normal to me.

Q. And then what did you say when he said that they didn't guarantee him anything?

A. I said, "Well, did they guarantee you anything?"

He says, "No, and I don't know if it is a fake or not."

And I started to walk to the door to go out. I told him I didn't want any parts of it and I think he should put the money back in the bank.

The doctor hemmed and hawed around a little bit (176) and he said, "Maybe you are right."

He handed me the package. He said, "I am going back in the dining room and get my hat and coat."

First he asked me if I would go over with him to the bank. I said, "Yes, sir. I will."

I figured he was going to the bank. He went back into the dining room to get his hat and coat.

Q. Let us stop there. He handed you the package. Is that what you said?

A. That is what he did.

Q. And what if anything did he say to you when he handed you the package?

A. He said he is going back to the dining room, get his hat and coat, would come around and get me and we will go over together.

Q. Now, where was the dining room with reference to his private office—

A. Well, the dining room is directly in back of the it like leads around.

Q. Now, let me just get this clear. For him to go to the dining room he would have to go in the opposite direction from you?

A. That is right, towards the back of the house.

Q. You were coming straight out to the consultation room?

(177) A. Into the hallway.

Q. Into the hallway?

A. That is right.

Q. And he was going into the dining room to get his hat and coat?

A. That is right.

Q. By the way, what kind of a day was it that day as far as the weather?

A. I think it was a cloudy day. It was a hazy day.

Q. Was it raining or not?

A. It was raining. I went out into the hallway to walk out of his private office into the reception room and into the hallway—

Q. Now, let me ask you this. Is there an entrance from the dining room or from the rear into the hall?

A. Yes, sir. There is.

Q. I see. All right. Then what happened?

A. Well, I walked out expecting Dr. Mogavero to come up, and I heard this scuffle coming up the hall. Two men come running at me, one with a revolver in his hand, and I threw the money back in the reception room, or the package.

Q. Did you know these men?

A. I did not know these men. I never saw them before.

Q. All right.

(178) A. And they put me against the wall. They searched me, took things out of my pockets, and then they identified themselves. They were special agents.

Q. Now, up to the point that they came running towards you you did not know who they were?

A. No; I didn't.

Q. Did you know what was in the package?

A. Well, the doctor said it was $20,000. I didn't see it.

Q. I see. Now, why did you throw the package when these men came running towards you with the gun in their hand?

A. Well, the men came running up. I didn't know them. I didn't know what it could be—probably a hold-up, a man might have been following the doctor when he brought the money up. I don't know—until they identified themselves.

Q. Now, on April 19, 1949, when you went to Dr. Mogavero's office, how long did you stay there?

A. When I first met the doctor it was, oh, we went in there. We were ten, fifteen minutes, I guess.

Q. And you say that was on your lunch hour?

A. That is right.

Q. Did you go back to the office and do your job afterwards?

A. I know I put in a day's work.

Q. That is what I mean.

A. If I went back to the office, I don't know.

(179) Q. All right.

A. We were out in the field.

Q. You did a day's work on April 19, 1949?

A. That is right, sir.

Q. And did you also do a day's work on September 14, 1949, when you went to the doctor's office and he told you to come down the next day?

A Yes, sir; I did.

Q. Did you do a day's work on September 15, 1949—

A. Yes.

Q. —when you went down to his office?

A. Yes; I did. It was a working day and I worked all day.

Q. And did you work all day on October 7, 1949, except for this period?

A. Up till that point.

Q. That is right.

A. Up to about one o'clock.

Q. And you testified that you took time out; you say it was during your lunch hours; is that correct?

A. That is right. In fact, that day, October 7, I told Mr. Hill to go out in my car. I had warrants for restraint there. I had been out in the field all day working, and when they were taking me away I wanted to make sure that they were in the proper hands.

(180) Q. That was restraint bills that you had to collect from taxpayers; is that right?

A. That is right.

Q. Now, I don't know whether I asked you this question. I may have. I want to get this clear. I know I asked you one of them. From April of 1949, when you first met the doctor, to October of 1949, when you were apprehended in his home, did you ever tell the doctor that you were employed by the internal revenue?

A. No, sir. I never did.

Q. And I think we brought out, did we not, that during this same period you were not assigned to the doctor's case?

A. No, sir. I was not.

Q. And you had nothing to do with any sort of examination during this period of his case?

A. No, sir.

Q. Or prior to this time or even afterwards?

A. Never.

Q. Is your uncle available, Mr. Waldin?

A. I haven't heard from him for two years, but I think it is possible I can get a hold of him.

Q. I just want to know.

A. I would like to say one thing. When the special agents identified themselves I figured the doctor had framed me right (181) then and there.

Q. Was that your opinion?

A. Yes, sir. It was.

Q. Why would you think that the doctor would have done that to you?

MR. SWOTES: If Your Honor please, that is objectionable. That is highly speculative.

THE COURT: Objection sustained.

BY MR. DONOLOW:

Q. Your meetings with the doctor on these three occasions, did he seem concerned about his tax problem?

A. Well, the doctor was very much upset about it, very much.

Q. To what extent?

A. Well, he was hysterical about it. I will say that much.

Q. He was hysterical about what?

A. About his tax problem, and if he was to be indicted or not. This telegram sort of worried him very much. I assured him it was a fake, but he was getting other rumors and people calling him, apparently.

Q. And these other calls and rumors all were telling him he was to be indicted?

A. That was the way I understood.

MR. DONOLOW: Would Your Honor indulge me just one moment?

(182) BY MR. DONOLOW:

Q. Mr. Waldin, in all these two or three meetings that you had with Dr. Mogavero and the conversations, conversation you had with Mr. Herskowitz, did they in any way affect your work with the government in carrying out your duties?

A. No, sir; they did not.

Q. Did you have anything to do with the recommendation of a criminal prosecution for Dr. Mogavero in your duty as a zone collector of revenue?

A. I had nothing to do with his tax problem, didn't come under our jurisdiction.

Q. Did you have anything to do with the determination of the amount of taxes that Dr. Mogavero owed?

A. No, sir; I did not.

Q. Did you attempt to offer Dr. Mogavero any improper or corrupt help and assistance for the purpose of defeating—

A. No, sir.

Q. —any taxes he may owe?

A. No, sir; I did not.

Q As a matter of fact, isn't it true that Dr. Mogavero never knew he owed any taxes?

A. That is right.

MR. SWOTES: Your Honor—

MR. DONOLOW: Well, we can agree on that. (183) You know it yourself.

MR. SWOTES: Mr. Donolow doesn't know that, and it is highly leading.

MR. DONOLOW: You agreed on that.

MR. SWOTES: Agreed on what?

MR. DONOLOW: That Mogavero didn't owe any taxes.

THE COURT: Have you agreed? There wasn't any proof on that in the case.

MR. DONOLOW: All right. Cross-examine.

Cross-Examination

BY MR. SWOTES:

Q. Well, Mr. Waldin, you have told us that in 1949 you were a deputy collector?

A. That is right.

Q. The deputy collectors were located where again? Where was your office?

A. 11th floor of the Gimbel Building.

Q. And the special agents were in the Ayer Building?

A. That is right.

Q. And the revenue agents were in the Widener Building?

A. That is correct.

Q. You have also told us that you at no time told Dr. Mogavero that you were a deputy collector or that you (184) were connected with the Revenue Department?

A. No, sir. I never had occasion to mention it to him.

Q. Do you know whether Dr. Mogavero knew that you were in the Revenue Department?

A. He never knew where I worked.

Q. Well, do you know that as a fact?

MR. DONOLOW: Yes. He can testify. Do you want him to testify?

MR. SWOTES: Well, now, let the witness answer.

THE WITNESS: I know he didn't know where I worked.

BY MR. SWOTES:

Q. How do you know that?

A. Well, if he did he would have mentioned it to me some time or other.

Q. Well, now, isn't it possible that Dr. Mogavero could have determined your position from some other source?

A. If he did, he never let me know about it, and I don't know why he would hide it.

Q. Well, but it is possible, isn't it?

MR. DONOLOW: Well, now, if Your Honor pleases, that is res judicata, because that was already testified in in another case. It is on record. Dr. Mogavero himself testified.

(185) MR. SWOTES: Well, now—

MR. DONOLOW: Now he is bound by it in another case.

MR. SWOTES: Now, Mr. Donolow, don't tell the jury what Mr. Mogavero testified.

MR. DONOLOW: Well, now, let us have the jury go out and we will argue it. It is res judicata in another case in 1950, and I am willing to argue it now and let His Honor hear it.

THE COURT: I don't know what is before the jury. Is there an objection to the question?

MR. DONOLOW: Yes. There is an objection.

THE COURT: What is the question?

MR. SWOTES: Would you read the question, Mr. Bosta, please.

(Last question read as follows:)

"Q. Well, but it is possible, isn't it?"

THE COURT: That is cross-examination on a subject that was brought up in direct examination, and the objection is overruled.

MR. DONOLOW: Well, then I will be able to go into Dr. Mogavero's testimony.

THE COURT: No. This is cross-examination. He is testing the credibility of this witness' testimony on (186) a point that was brought up in direct examination.

MR. DONOLOW: Well, may I call Your Honor's attention to Judge Ganey's opinion where that was set up as a fact. That is res judicata.

MR. SWOTES: I think this should be taken up at side bar.

THE COURT: Well, I ruled on this.

MR. DONOLOW: I ask for an exception, sir.

BY MR. SWOTES:

Q. Did Mr. Herskowitz know your job?

A. Mr. Herskowitz did know; yes, sir.

Q. Because he called you at your office?

A. That is right.

Q. Now, at the time you first met with Dr. Mogavero did you assume or think that he knew you were employed by the government or employed by the revenue service?

A. No, sir.

MR. DONOLOW: That is objected to.

THE COURT: I think he had already answered it.

(Last answer read.)

BY MR. SWOTES:

Q. You did not assume?

MR. DONOLOW: Well, now, that is objected to. How does he know what Dr. Mogavero assumed.

(187) MR. SWOTES: I asked him merely what he thought. That is all.

MR. DONOLOW: What Dr. Mogavero thought?

MR. SWOTES: I asked him what he thought, whether Dr. Mogavero knew what his job was.

THE COURT: The objection is overruled.

BY MR. SWOTES:

Q. And your answer to that is no; you did not think that he knew?

A. That is right.

Q. Your job?

(No response.)

Q. Did it seem strange to you if he did not know your job why he was telling you all about his tax difficulties?

A. Well, Herskowitz was his attorney at that time and he relied on what I had to say. He told me I was a good friend of his and apparently he just accepted it that way. The doctor understood, but he didn't know where I worked.

Q. Did it seem sensible or likely to you at that time that Dr. Mogavero would have aired his tax difficulties to a man who—

A. Well, he didn't air his tax difficulties.

Q. To a man whom he didn't know, he was never connected with the thing?

(188) A. He didn't air his tax difficulties.

MR. DONOLOW: Well, now, just a minute. The witness just answered the question. I think the record will show, that Dr. Mogavero testified on the stand that he didn't know where he worked. Now, he just said that for the record. Now, that certainly should stop that, because we don't have Dr. Mogavero here.

MR. SWOTES: I didn't hear him say that.

(Record read.)

THE COURT: Mr. Donolow, you suggested something that was not an answer.

MR. DONOLOW: No, Your Honor. He just said that from the stand. The stenographer missed it.

THE COURT: I didn't hear it.

MR. SWOTES: Let us go ahead. I think, Your Honor, that Mr. Donolow should be instructed that he should not testify in this case.

THE COURT: Yes. You interjected something there that was not on the record.

MR. DONOLOW: Well, Your Honor, we will prove this with the record, anyway.

BY MR. SWOTES:

Q. Now, my question before was, did you not think, believing as you did, that the doctor did not know who you were—did (189) you not at that time think it was strange that he told you all his affairs at that time?

A. The only thing he told me was about this telegram. He didn't tell me about his tax affairs.

Q. Well, why should he tell you that?

A. Because Mr. Herskowitz told him.

Q. Told who?

A. That he would be able to get some advice on it, about the telegram.

Q. But he didn't indicate to him why you were qualified to give that advice?

A. No. He did not.

Q. And, as a matter of fact, you did give some advice. You said the internal revenue doesn't work that way?

A. That is right.

Q. Did you amplify that in any way by telling him how you knew the internal revenue did not work that way?

A. No, sir. I didn't.

Q. And the doctor accepted it as you gave it?

A. That is right.

Q. Now, did you at that time assure Mr. Herskowitz or the doctor that you would attempt to get some information for him?

A. The only information he asked me was to tell him whether the telegram was a fake or not. In other words, when he (190) called me on the phone, that is all he wanted to know.

Q. In other words, you weren't asked by Herskowitz or the doctor to get any figures for him?

A. I couldn't get him any figures.

Q. I asked you whether you were asked to get figures for him.

A. No, sir. He never asked for figures.

Q. In other words, you were present while Mr. Herskowitz testified, were you not?

A. Yes, I was.

Q. And did you understand him, as I did, that you said you would see if you could get figures for him?

A. I understood him to say, but he never asked me to get figures.

Q. He is mistaken?

A. He never asked me to get figures. When he called me on the phone all those times—and he called me many

times on the phone—all he wanted to know was about the telegram. I understand he went to Festa evidently, and I didn't know that. Apparently he was shopping around pretty good.

Q. But Mr. Herskowitz said that he called you to get figures, but you say that that was wrong, that he called you only for the telegram?

A. Concerning the telegram; yes, sir.

(191) Q. Now, how many times would you say you spoke to Mr. Herskowitz over a period of time? And for how long did you continue to speak to him?

A. Well, he called me two or three months after that, two or three times a week, at least.

Q. Were you still talking to Mr. Herskowitz around the end of July or the beginning of August?

A. Sure. I was talking to Herskowitz. Do you mean when last I talked to Herskowitz on the phone?

Q. Well, were you still receiving calls from him about the case at that time?

A. I was receiving calls from him up till—up till my mother died in August. He was out to the funeral.

Q. And all those calls were about the telegram?

A. That is right.

Q. Never discussed anything else?

A. Well, we might have discussed about something had nothing to do with this.

Q. Well, I mean about the doctor, the doctor in the case.

A. No, never did.

Q. All he wanted to know was about the telegram?

A. That is right.

Q. And what did you tell him when he asked about the telegram?

(192) A. I told him the same as I told him in the doctor's office, that the internal revenue doesn't operate that way.

Q. And he continued to call you two or three times a week for two or three months only to get the same answer you gave each time?

A. Well, when he called me, that was the main reason he called me; that is right.

Q. Were you supposed to check on it or look it up for him?

A. No, sir. I didn't have to.

Q. Well, did you think you were going to do that?

MR. DONOLOW: That is objected to.

BY MR. SWOTES:

Q. Did you tell him you were going to do it?

A. I don't know if I told him I was going to check on it. I was very certain they didn't operate that way, and I told him so.

Q. And if you told him so the first time, why did he call you?

A. I don't know, just to be sure of himself, I guess.

Q. In other words, he just wanted to reassure himself so he kept calling you?

A. That is right.

Q. He had not been told by you that you were going to check on it?

(193) A. No.

MR. DONOLOW: Well, the witness answered that.

THE WITNESS: No.

MR. SWOTES: Oh, all right. I will withdraw the question. Yes. He did. You are right.

BY MR. SWOTES:

Q. Now, Mr. Herskowitz testified with reference to a conversation that he had with you around the end of July or the beginning of August where you put a man by the name of McDougal on the phone, and then later on you came back and you started talking to Mr. Herskowitz about the doctor's name being spread all over the newspapers and $20,000. Did you ever have that conversation?

A. That is not true.

Q. That is positively not true?

A. That is right.

Q. Do you know a man by the name of McDougal?

A. I do.

Q. Who is he?

A. He was a deputy in the internal revenue.

Q. Was he associated with you?

A. He worked in another squad. I would see him every day.

Q. Is he now connected with revenue?

A. I don't think so.

(134) Q. Did you ever ask McDougal to talk to Herskowitz?

A. I don't even think they know each other. Herskowitz might call him. I don't know. Apparently he knows several deputy collectors, but—

Q. That is not my question.

A. —he never met him through me.

Q. I asked you whether you ever put McDougal on the telephone to talk to Herskowitz.

A. No; I did not.

Q. In other words, that is a complete untruth?

A. That is right.

Q. And you also heard Mr. Herskowitz testify with reference to a conversation which he had with you on the telephone on the 20th of September at which time he suggested that you called him—oh, I don't—I want to be sure my words are fairly accurate—but you called him and you told him that you had been talking to the doctor about $20,000 and he was in hot water and unless—

A. I never called him.

Q. You never did?

A. Most of the time he called me. In fact, I know I didn't call him in September.

Q. You know you did not call him at all in September?

A. That is right.

(195) Q. Were there any times throughout these three or four months that you speak of that you called him or did he call you?

A. He always called me. I never called him.

Q. You never did?

A. I had no reason for calling. I have called him for several years maybe once or twice a month, but, I mean, I knew him for quite a while. Sometimes we would have lunch together, but at that time I never had any occasion to.

Q. But you are certain that you never called him with reference to Dr. Mogavero?

A. No; I didn't.

Q. Now, you told us that the doctor called you—I think it was on the 13th of September—and pursuant to his request you came to his office on the 14th of September. It was during your lunch hour, wasn't it?

A. That is right.

Q. And he was too busy to see you then?

A. That is right. He was very busy.

Q. Then he told you to come on the 15th of September?

A. Told me to come to his South 15th Street address; yes, sir.

Q. And, as a matter of fact, from what you tell us you also gave up your lunch hour on the 7th of October to see this man?

(196) A. That is right.

Q. Why?

A. Why I gave up my lunch hour?

Q. Yes.

A. Well, it was on my lunch time I went down. It wasn't—I had nothing to do at my work. It was just a personal deal, had nothing to do with the internal revenue.

Q. Well, did you feel so obligated to Dr. Mogavero that you would jump every time he snapped his fingers and give up your lunch hour just because he said, "Come down and see me"?

A. It wasn't that many times, Mr. Swotes. I did owe him a little favor, if I could help him. I mean, he had been very good to me all that summer with my mother.

Q. Now, you testified on direct examination that you went to the doctor's house on South 15th Street, I think it was the 15th of September, wasn't it, and you saw the doctor and his mother and his wife there?

A. That is right.

Q. And the doctor told you that he was going to get a call from someone about his tax matters and he wanted you to talk to him?

A. That is right.

Q. Why did he want you to talk to him?

A. Well, apparently he wanted me to give him some advice, (197) the doctor.

Q. But he didn't know that you were a revenue man?

A. Well, he had an attorney, Mr. Herskowitz, so he apparently—Mr. Herskowitz told him I could give him advice; so he accepted it.

Q. Now, you heard Mrs. Mogavero testify yesterday?

A. Yes, sir; I did.

Q. And she tells the story a little different, differently from the way you tell it; am I correct?

A. In what way?

Q. Well, as I recall her testimony, she said that you came in and told the doctor that you expect a call from a man by the name of Bill whom you apparently knew. That is the way Mrs. Mogavero told the story.

A. Well, that is not right. Dr. Mogavero asked me to come down there, and he told me he was getting a call when I got to his office, that he was getting a call that afternoon, and he would like me to talk to this party.

Q. Now, Mrs. Mogavero states that when the phone rang the doctor answered it and then came over and then said, "Ernie, it is for you."

A. The doctor came over and asked me if I would talk to this party.

Q. Mrs. Mogavero said—

(198) A. It is not so.

Q. —that the doctor said, "It is for you."

A. That is not right.

Q. In other words, Mrs. Mogavero was wrong?

A. Mrs. Mogavero was wrong.

BY THE COURT:

Q. What time of day was that?

A. I would say it was around one o'clock, Your Honor.

BY MR. SWOTES:

Q. Mrs. Mogavero also states that when you came in she asked you what this is all about and you said, "They want $20,000."

A. I never told her that. The doctor told me they want $20,000, told her, too.

MR. DONOLOW: If Your Honor pleases, I don't think Mrs. Mogavero said that here.

MR. SWOTES: Well, if she didn't, I am mistaken, but if she did that she is wrong, because that isn't what happened!

THE WITNESS: That is right.

BY MR. SWOTES:

Q. Now, you said on direct examination that when the doctor ushered you to the door on that day he said something about you being ungrateful, that he had helped you, and why wouldn't (199) you help him!

A. That is right.

Q. What did he mean by that!

A. Well, I wouldn't talk to this friend of his on the telephone. He wanted me to talk to him and assure him that what was going on—but I wouldn't talk to the man, and that is why he was peeved about it.

Q. He wanted you to talk to him and what!

A. He wanted me to talk to this politician, apparently, on the telephone on that day, and I wouldn't talk to him.

Q. Well, for what purpose? Did he tell you why he wanted you to talk to him?

A. So I could advise the doctor.

Q. So you could advise him!

THE COURT: Didn't you talk on the telephone at all on that time?

THE WITNESS: I talked to the gentleman and he said something about fixing the doctor's indictment or tax, and I didn't let him finish. I called the doctor over and I said, "You talk to this man."

He talked to him, and that is when he come over and mentioned the $20,000, when he got through talking to that party.

BY MR. SWOTES:

(200) Q. Now, is that the first time that you heard anything about $20,000 to fix the doctor's case?

A. That is right.

Q. That is the first time you ever heard about it?

A. First I ever heard of it.

Q. Did you report that to your superiors?

A. No, sir; I did not.

Q. Did you report it to anybody in the government service?

A. No, sir; I didn't.

Q. Why not?

A. Who was I going to report to? I mean, I didn't know who was asking for the money. I wouldn't know who to say was asking the doctor for $20,000. He never told me.

Q. Didn't you think it was a duty to make a report that a demand was made by an anonymous person that you didn't know?

MR. DONOLOW: That is objected to.

THE COURT: Overruled.

BY MR. SWOTES:

Q. The Judge wants you to answer the question, Mr. Waldin.

A. No; I didn't think it was necessary to report it.

Q. What was the next time you talked to the doctor about this matter?

A. Well, he called me on October 4. That was the time that he asked Mr. Gibbons—told me Mr. Gibbons would be there (201) and to come down and see him.

Q. What was the conversation at that time?

A. On October 4?

Q. Yes.

A. He called me at my house and asked—told me that Dr.—that Mr. Gibbons was going to close out his case towards the end of the week and he would like me if I would come down and talk to him.

Q. Did he tell you why he wanted you to talk to him?

A. Well, I assumed that all along, just to give him advice.

Q. You never really knew why he was so anxious for your advice since he didn't know what you were, where you worked?

A. The only reason I assumed what I said before, Herskowitz was his attorney, and he relied on what I told him. He was very much relieved when I told him the telegram was a fake.

Q. And then when did he tell you to come down and see Gibbons?

A. Friday. That would be October 7.

Q. He didn't tell you what was going to be discussed at that time?

A. No. He did not, not at all.

Q. And he arranged for you to meet him and Mr. Gibbons at his office, not at Mr. Gibbons' office, but the doctor's office?

(202) A. South 15th Street; that is right.

Q. And then, as you told us, you went down there?

A. I went down on October 7, and that was around one o'clock.

Q. And when you went in the office you and the doctor closed the door, and then you had certain conversations together; is that right?

A. That is right.

Q. You have repeated the conversations. The first thing the doctor said was, "I am going to give them $20,000." That is what you said the doctor said to you in effect, isn't it?

A. Yes, sir, that he picked the package off his desk and he was holding it like this (indicating), and he said, "I am going to give them $20,000."

Q. Now, Mr. Tucker said and Mr. DiMaggio also said that they overheard the doctor say, "Well, here is the $20,000; here is the damn money, just like you asked. Now, what do I get for it?"

Did the doctor ever say that to you?

A. No. He did not.

Q. In other words, Mr Tucker or Mr. DiMaggio are either mistaken or they are not telling the truth?

A. They could be mistaken.

MR. DONOLOW: That is objected to.

(203) THE COURT: He said they could be mistaken. It is an argument to the jury rather than something for the witness to testify to.

BY MR. SWOTES:

Q. Then they said that you said, "Don't worry. Everything will be taken care of." You didn't say that?

A. Did I say that? No, sir; I didn't.

Q. This is what they say you said.

A. No, sir; I did not.

Q. You didn't say that?

(No response.)

Q. Then they said something to the effect that the doctor said, "Well, how do I know the whole thing isn't a fake?" I think you said that the doctor said that, didn't he, something to that effect?

A. Yes, sir.

Q. Then Mr. Tucker and DiMaggio said, "Don't worry." They said that you said, "Don't worry. You will be shown the figures."

A. I asked the doctor, "Did they show you figures?" I didn't tell him, "Don't worry."

Q. Did you tell the doctor he could forget about the indictment?

A. I did not.

(204) Q. So that if they so testified, they were mistaken?

MR. DONOLOW: That is objected to. The jury will come to its own conclusion.

THE COURT: Objection sustained.

BY MR. SWOTES:

Q. Now, according to the way you described the situation then, you said something to the doctor about putting the money back into the bank, didn't you?

A. Yes, sir; I did.

Q. And right at that instant the doctor changed his mind and he said, "All right; I will do it. I will put it back in the bank." Is that what happened?

A. Well, he said, "I think I will take your advice. I will put it back."

Q. Just like that? No further discussion? He just changed his mind?

A. Yes, sir. That is right. He might have said something in there. I don't remember exactly everything.

Q. Well, did he argue or debate the point with you?

A. Well, we were—I did tell him right along. I told him not to pay the money. I told him I didn't want any parts of it and I told him he should put it back in the bank, and he said, "I guess you are right." He asked me if I would go over with him, put it in the bank.

(205) Q. And he then handed you the money?

A. That is right.

Q. To meet him out front, and he went around to get his hat and coat, to meet him in the hallway?

(No response.)

Q. How big was this package?

A. How big was it?

Q. Yes.

A. I guess it was about this thick, I guess, long as the bills.

Q. And it was the width and length of a regular bill, wasn't it?

A. Yes, sir.

Q. It wasn't a big package?

A. No.

Q. It wasn't a heavy package?

A. No. It wasn't heavy.

Q. Why didn't he just take it with him instead of handing it to you?

A. Well, I assumed he was going back to get his hat and coat, and I assumed he was going back with it to put it back in the bank, and he had a coat in the dining room, to get his hat and coat, and it would be more convenient for him to walk through there than to come back to the office again.

(206) Q. Well, didn't you ask him to take it with him?

A. I figured he was going back to the bank with it and I was going with him; so I walked out in the hallway.

Q. And you were perfectly willing to hold $20,000 in cash?

A. Well, I was in his own home. I am not running away with it.

Q. Then you walked out and you saw Mr. Tucker and Mr. DiMaggio; you didn't know them there, but you subsequently found out that is who they were, running down the hall at you?

A. That is right.

Q. How were they running?

A. Well, I don't know exactly. I heard the scuffling down the hall.

Q. Were they one ahead of the other or side-by-side?

A. One was ahead of the other a little bit. The hallway was narrow.

Q. Who was ahead?

A. The gentleman who had the gun was ahead—I know I saw that—and I am pretty sure it was Mr. Tucker. I am not sure it was Mr. Tucker, but the one had the revolver was in front.

Q. What was the first thought you had in your mind when you saw that?

A. I figured it must have been a robbery, it happened so (207) fast, and when I saw the gun and everything.

Q. And you then threw the package in back of you?

A. I threw the package back into the reception room.

Q. And then they got you up against the wall and they searched you?

A. That is right.

Q. Now, did you at any time say to them something to this effect? "I don't know what this is all about, but for all I know Dr. Mogavero owed my father money and I am just collecting it?"

A. I don't remember saying that.

Q. Never said it. You heard the agents testify that you did say it?

A. Yes; I did.

Q. Why didn't you explain the situation to the agents when you found out who they were?

A. They didn't give me a—

Q. Why didn't you tell them the story that you have told us now?

A. They didn't give me much time to explain.

Q. What do you mean by that?

A. I figured the best thing to do is wait till I have my attorney there, and I did, and we did take it up to the courthouse, and I talked to Mr. Fleming at the courthouse, (208) and I asked him if I could call in an attorney.

Q. But you never said, "I am collecting this money for my father"?

A. I don't remember saying that.

Q. Well, you did not say it, in other words?

MR. DONOLOW: He said, "I don't remember." He answered you twice.

MR SWOTES: I just want to get a definite answer. That is all.

BY THE COURT:

Q. Did you give any explanation to the officers at the time they arrested you as to why that money was there on the floor that you had previously had in your hand?

A. No, sir. We didn't talk about it at all.

BY MR. SWOTES:

Q. Did they ask about it?

A. I don't remember them asking me about it; no, sir. I will admit I was a little excited.

* * * * * * * * *

(209) *Redirect Examination*

BY MR. DONOLOW:

Q. Now, Mr. Waldin, the same testimony that you have been giving here today did you give in September of 1950 at the prior trial?

A. Yes, sir.

* * * * * * * * *

(211) MR. DONOLOW: Oh, well, I have some motions to make.

If Your Honor pleases, at this time I move for judgment of acquittal.

THE COURT: Denied. I notice you have a point for binding instructions here written in longhand.

MR. DONOLOW: Yes. We just did that, Your Honor.

* * * * * * * * *

V.

(238) CHARGE OF THE COURT

I am going to deny all the defendant's points for charge, including the point for binding instructions.

Of course, my theory in denying these points for charge is that I have covered the various points in my charge generally.

Are there any comments by counsel?

MR. DONOLOW: Yes, sir. Would Your Honor charge the jury what is meant by appointed and acting under the authority of the revenue laws?

THE COURT: I will only say this, that there is evidence that Mr. Waldin was a Revenue Agent at the time of this alleged crime. That is all I will say about that.

MR. DONOLOW: May I ask for an exception in the record to that?

THE COURT: Yes

* * * * * * * * *

(244) DEFENDANT'S POINTS FOR CHARGE

Defendant respectfully requests this Honorable Court to instruct the jury on the following points:

* * * * * * * * *

4. If you believe, as testified in this case, that on September 15, 1949, the defendant said to Doctor Moga-

vero, "You better seek other counsel, I don't want any (245) parts of this matter. Why don't you get help at the hospital?" then this announcement should be regarded by you as a withdrawal by the defendant from the conspiracy. If you then believe that through the planning of both the Special Agents and Doctor Mogavero the defendant was urged, incited and persuaded to come back into the unlawful conspiracy again, and that the Special Agents prepared the package of money and other plans in order to entrap, arrest and prosecute the defendant therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of Not Guilty.

* * * * * * * * *

(246) 9. If you find beyond a reasonable doubt that there was in existence a conspiracy and that the defendant was one of the conspirators, you must find that any acts of the defendant were done while he was acting under the authority of his office before you can find the defendant guilty as charged of violation of 26 U.S.C.A., Section 4047 (e) (4), and also you must find that the defendant entered into the conspiracy while acting under the color of authority of his office.

(246a) POINTS FOR BINDING INSTRUCTIONS

Under all the law and evidence of this case you must bring in a verdict of not guilty.

VI.

GOVERNMENT'S CLOSING ARGUMENT

Philadelphia, Pa., September 25, 1956
Before Hon. Allan K. Grim, J. and a jury

* * * * * * * * *

GOVERNMENT'S CLOSING ARGUMENTS

* * * * * * * * *

So you have a conflict between what Mr. Waldin says and what Mrs. Mogavero says. The thing that seems strange to me, if I can digress for just a moment, that I would like to call to your attention at this time, is that there has been some evidence that Dr. Mogavero didn't know who Mr. Waldin was, didn't know his position, and yet Mr. Waldin states that the doctor kept consulting him on numerous occasions with reference to his tax affairs, despite the fact that the doctor was represented by counsel all the while—of course, Mr. Herskowitz, and then Mr. Clary and Mr. Gibbons—and that apparently the doctor just took this young man about whom he knew very little and who had no particular qualifications in tax affairs, as far as he knew, and kept calling him over and over again to consult with him on his various affairs.

Along the same lines you have the request, according to Mr. Waldin, by Dr. Mogavero that Mr. Waldin come to his house on the 7th of October and talk to Mr. Gibbons about Dr. Mogavero's tax affairs. Some of you may have wondered why the meeting wasn't held in Mr. Gibbons'

VII.

OPINION

(Criminal No. 18512)
(Filed April 9, 1957)

Grim, J. April 9, 1957

The defendant in this case has been charged with conspiracy to defraud the United States in that as a Zone Deputy Collector of Internal Revenue he conspired to obtain and did obtain money from a taxpayer by "fixing" or pretending to "fix" an income tax case against the taxpayer. Defendant was found guilty in a jury trial and has filed motion for new trial and for judgment of acquittal.

In view of the verdict against the defendant the facts may be stated as follows: In the early part of 1949 Dr. Francesco Mogavero's income tax liability was being investigated by the Internal Revenue Service. Dr. Mogavero retained the services of Albert S. Herskowitz as his attorney in these income tax problems. Herskowitz communicated with the Internal Revenue Bureau several times in an effort to get the facts in the case, but was unsuccessful. Because of his inability to get the facts from the Bureau Herskowitz got in touch with an old friend of his, Ernest T. Waldin, the defendant, who was a Zone Deputy Collector of Internal Revenue. As a Deputy Collector, defendant had only limited powers related to the collection of taxes. He had no power or discretion to determine how much tax was due or how much would be accepted in any case. The zone or area to which he was assigned did not

include the places where Dr. Mogavero lived or had his office. Defendant had no authority to make an income tax collection from Dr. Mogavero.

Some time after Herskowitz got in touch with defendant, the defendant called him on the telephone and told him that one, McDougal, wished to speak to him about the Mogavero income tax problem. McDougal came on the line and after Herskowitz had spoken to him (McDougal), the defendant again took over the telephone. Herskowitz then told defendant that McDougal had said that in order to avoid a criminal prosecution Dr. Mogavero would have to "put up" $20,000. When Herskowitz said this defendant replied that it wasn't for him, it was for McDougal: ". . . it was for . . . these other guys." When Herskowitz asked, "What other guys?" defendant said, "The fellows that are going to take care of this thing."

Later defendant called Herskowitz on the telephone and told Herskowitz that he (the defendant) ". . . was going to be or had been in touch with Dr. Mogavero, pressing him to accept this proposition of putting up $20,000 to avoid this tax prosecution." During this telephone conversation with Herskowitz defendant said also, "I want to do something for Mogavero. He came over and took care of my mother for me, and I like him . . . but I tried to set this thing up for these other people and . . . this is the only way out in this matter." Later, to avoid a criminal prosecution and as a result of defendant's suggestion, Dr. Mogavero handed defendant a package containing $20,000 in cash and said to defendant: "Well, here is the $20,000. Now, what do I get for it? . . . How do I know the whole thing isn't a fak·? . . . How do I know I won't be indicted anyhow?" To this defendant answered, "Don't worry . . .

everything will be taken care of and you can forget about the indictment. Those others wouldn't double-cross me."

The indictment charged that "Ernest T. Waldin, the defendant herein, and divers other persons whose true identity is . . . unknown, co-conspirators but not named as defendants herein because their names are unknown . . ., did wilfully, knowingly, unlawfully and feloniously conspire with each other to commit offenses against the United States, to wit: . . . to defraud the United States (a) of and concerning its right to have its governmental function or administering the Internal Revenue Laws . . . free from corruption, partiality, improper influence, bribery and dishonesty."

Defendant was indicted under an Act of Congress (26 U.S.C.A. former Sec. 4047) which provided [1]:

> "Every officer or agent appointed and acting under the authority of any revenue law of the United States . . . (4) Who conspires or colludes with any other person to defraud the United States . . . shall be fined . . ."

A revenue official, defendant contends, who engages in a conspiracy to obtain money from a taxpayer by "fixing" or attempting to "fix" his criminal income tax case cannot be guilty under this statute because, he contends, in doing this he is not "acting under the authority of any revenue law of the United States." He contends that if he engaged in such a conspiracy he then acted in his individual capacity and beyond the authority of any revenue law. The government, however, contends that the mere fact

[1] The statute was amended in 1954, 26 U.S.C.A. Sec. 7214 (a)

that defendant was a Zone Deputy Collector of Internal Revenue was enough to satisfy this requirement of the statute.

The opposing contentions in reference to this question were presented to Judge Lord of this court in an argument on a motion to dismiss this indictment. Judge Lord upheld the contention of the government, denied the motion to dismiss the indictment and as to this question established the law of the case, saying:

> "To sustain defendant's contention that the fraudulent act must be done under the authority of his office would be to unduly restrict the scope of the statute. The statute is *descriptive only*. An agent or officer of the Internal Revenue Department occupies a position of utmost fidelity and loyalty to the government and as a necessary consequence to this is vested with access to records and knowledge not available to the taxpayer in general. . . At the time defendant communicated with taxpayer he was in fact a revenue agent and is alleged to have conspired to defraud the United States. The mere fact that defendant did not make his capacity as an agent known to the taxpayer and the act was committed outside of the 'zone' to which he was assigned is of little significance. The important fact is that at all times alleged he was employed by the Internal Revenue Service. If the court should adhere to defendant's interpretation of the statute, it would result in the strained conclusion that *only* if defendant made his capacity as an agent known to the taxpayer, and further, committed the questionable acts *only* within the 'zone' assigned could he be charged with violation of section 4047(a) (4). With

this I cannot agree." U. S. v. Waldin (E.D. Pa. 1956), 138 F. Supp. 791 at page 796.

The indictment charged that the defendant violated not only the conspiracy provision of the Revenue Code, 26 U.S.C. former Sec. 4047, but also the conspiracy provision of the Criminal Code:

> "If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined. . ." 18 U.S.C.A. Sec. 371.

In his charge to the jury the trial judge defined the word conspiracy and said:

> "A conspiracy is an agreement by two or more people to commit a crime in concert attended by an act of one or more of the conspirators to effect the object of the conspiracy."

In defining the word conspiracy in this manner the trial judge used the general definition of a conspiracy taken from the Criminal Code provision. Since that provision requires an overt act by a conspirator to complete the crime while the Revenue Code provision does not, the charge to the jury gave defendant an advantage to which, perhaps, he was not entitled. By finding the defendant guilty, however, after the charge which stated that an overt act was essential to the crime of conspiracy, the jury apparently found that he had committed at least one overt act: most likely that he had received the $20,000 payment.

The United States government is entitled to the honest and uncorrupted services of its agents and employees, and when a person conspires to corrupt an agent or employee

of the government he thereby conspires to defraud the United States. Hammerschmidt v. U. S., 265 U. S. 182 (1942), Glasser v. U. S., 315 U. S. 60 (1942), U. S. v. Manton, 107 F. 2d 834 (2d Cir. 1939), U. S. v. Witt, 215 F. 2d 580 (2d Cir. 1954), U. S. v. Griffin, 176 F. 2d 727 (3d Cir. 1949). There was ample evidence that an object of the conspiracy was to corrupt both unidentified agents or employees and the defendant himself.

In a previous case in this court defendant was charged with and convicted of a violation of subsection (10) of 26 U.S.C.A. former Sec. 4047[2] in accepting illegally the $20,000 which apparently the jury in the present case also found that he accepted. The trial judge in the previous case granted judgment of acquittal, U. S. v. Waldin, 139 F. Supp. 156 (E.D. Pa. 1951). That acquittal, however, does not protect defendant from a conviction in the present case. In the present case defendant is charged with a conspiracy rather than a substantive crime and an acquittal on a charge of a substantive crime does not preclude a prosecution of a conspiracy to commit the same substantive crime. Pinkerton v. U. S., 328 U. S. 640 (1946), Sealfon v. U. S., 332 U. S. 575 (1948), U. S. v. DeAngelo, 138 F. 2d 466 (3d Cir. 1943).

It should be pointed out that the crime of accepting money illegally (the charge in the previous case) is not the

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[2] "Every officer or agent appointed and acting under the authority of any revenue law of the United States . . . (10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do . . . shall be fined . . ." See amended provision, 26 U.S.C.A. Sec. 7214(a).

same thing as defrauding the United States as is charged in the present case. Perhaps if the defendant had been acquitted in the first case the question of fact of whether or not defendant received the $20,000 payment would be res adjudicata and he could not be faced again with a charge involving this question of fact. This problem is not before me, however, since the defendant was found guilty in the previous case and at no time, either by the jury or the judge, was it found as a fact that defendant did not receive the $20,000 which in both cases he was charged with accepting.

Defendant's motions for a new trial and for judgment of acquittal will be denied.

(s) Allan K. Grim,
J.

VIII.

SENTENCE OF THE COURT

On this 29th day of April 1957 . . . It is adjudged that the defendant has been convicted upon a verdict of guilty of the offense of conspiracy to commit offenses against the United States. . . .

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

ALLAN K. GRIM,
United States District Judge.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 930

ERNEST T. WALDIN,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CONTENTS OF PETITION.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision and Statutes Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	12
Appendix A—Opinion Below	A1
Appendix B—Judgment Below	A13
Appendix C—Opinions Below Sur Petition for Rehearing	A14
Appendix D—Order Denying Rehearing	A19
Appendix E—Constitutional Provision and Statutes Involved	A20

TABLE OF CASES CITED.

	Page
Angel v. Bullington, 330 U. S. 183 (1947)	4
Askins v. United States, 251 F. 2d 909 (D. C. Cir. 1958)	12
Collins v. Loisel, 262 U. S. 426	5
Forthoffer v. Swope, 103 F. 2d 707 (C. A. 9, 1939)	10
Galvan v. Press, 347 U. S. 522	12
Grunewald v. United States, 353 U. S. 391	8
Pruett v. United States, 3 F. 2d 353 (C. A. 9, 1925)	11
United States v. Browne, 225 F. 2d 751 (C. A. 7, 1955)	11
United States v. Franklin, 188 F. 2d 182 (C. A. 7, 1951)	11
United States v. Kaiser, 7 Cir., 138 F. 2d 219	9
United States v. Kurzenknabe, 136 F. Supp. 17 (D. C. D. N. J. 1955)	7
United States v. Munsingwear, Inc., 340 U. S. 36	4
United States v. Oppenheimer, 242 U. S. 85	5
United States v. Parrino, 203 F. 2d 284 (C. A. 2, 1953)	11
United States v. Scharton, 285 U. S. 518	8
United States v. Temple, 105 U. S. 97	6
United States v. Waldin, 138 F. Supp. 791	3
United States v. Waldin, 139 F. Supp. 156	2
United States v. Waldin, 149 F. Supp. 912	3
United States v. J. R. Watkins Co., 16 F. R. D. 292 (D. C. D. Minn.)	11
United States v. Witt, 215 F. 2d 580 (C. A. 2 1954)	8
Yawn v. United States, 244 F. 2d 235 (C. A. 5, 1957)	5

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
H. Rep. No. 2543, 83rd Cong., 2nd Sess., p. 79	8
H. R. 8300, 83rd Cong., 2d Sess.	7
Internal Revenue Code of 1939:	
Section 3748, paragraph 1	8
Section 3748(a)	7
Section 4047(3), (4)	8
Section 4047(e)	7, 8, 9
Section 4047(e)(4)	2, 3, 4, 6, 7, 8
Section 4047(e)(10)	2, 4
Internal Revenue Code of 1954:	
Sec. 6531(7)	7
Sec. 7214(a)	7
Sec. 7851	7
Mertens Law of Federal Income Taxation Code Commentary, Sec. 6531, footnote 8	7
Miscellaneous Title, Sec. 201	7
Sen. Rep. No. 1622, 83rd Cong., 2nd Sess., pp. 587-588	8
18 U. S. C. § 371	6, 8, 9
18 U. S. C. § 3282	9
28 U. S. C. § 1254(1)	1
28 U. S. C. § 2255	12
U. S. Code Cong. and Adm. News, p. 5348	7
United States Constitution:	
Fifth Amendment	2
Wharton's Criminal Evidence (12th ed.) vol. 1, 64	12

IN THE

Supreme Court of the United States

October Term, 1957.

No. .

ERNEST T. WALDIN,

Petitioner

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ERNEST T. WALDIN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on February 14, 1958.

OPINIONS BELOW.

The majority and dissenting opinions in the Court of Appeals (Appendix A *infra*, pp. A1-A12, Appendix C, *infra*, pp. A14-A18) have not yet been officially reported. The opinions of the District Courts have been reported in 139 F. Supp. 156 (E. D. Pa. 1951); 138 F. Supp. 791 (E. D. Pa. 1956); 149 F. Supp. 912 (E. D. Pa. 1957).

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, p. A13 *infra*) was entered on February 14, 1958. A timely petition for rehearing was denied on April 9, 1958 (Appendix D, p. A19 *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

Whether, after petitioner was acquitted in 1950 for a 1949 violation of Section 4047(e)(10) of the Internal Revenue Code, the statute of limitations, the doctrine of res judicata, and the Fifth Amendment invalidates a 1955 indictment and sentence of petitioner involving the same 1949 transaction for violating Section 4047(e)(4) of the Internal Revenue Code.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

The constitutional provision and statutes involved are set forth in Appendix E, pp. A20-A22 *infra*.

STATEMENT.

Petitioner, at the time of the acts charged, was a deputy collector for the Bureau of Internal Revenue (App. 146a).* The wrongdoing charged in a series of five indictments was based on an attempt to obtain money from the taxpayer under the pretense of protecting him against a prosecution for income tax evasion. The petitioner had no authority to collect or determine how much tax was due or to prevent any prosecution for income tax evasion.

Petitioner was first indicted, tried and convicted in 1950 on a charge of accepting money illegally in violation of 26 U. S. C. A. § 4047(e)(10). The trial judge thereafter granted a motion for judgment of acquittal. *United States v. Waldin*, 139 F. Supp. 156. The specific ground was that petitioner was not "acting under the authority of any revenue law of the United States." There was then a series of indictments all dismissed and finally a fifth indictment in 1955 for a conspiracy to defraud the United States by "fixing" or pretending to "fix" an income tax case against

* "App." refers to the Appendix filed by petitioner below and there designated Appellant's Appendix. Nine extra copies have been filed.

the taxpayer (App. 3a-8a, 146a). There was no proof produced at the trial that the taxpayer owed any income taxes. (Typewritten transcript, p. 130). During the trial, motions for judgment of acquittal and a point for finding instructions were made and denied (App. 142a, 143a). The case was submitted to the jury on the sole charge that he had violated 26 U. S. C. A. § 4047(e)(4). The jury found the petitioner guilty. The trial judge in his opinion rejected the defense motion that had been made during trial and renewed after the verdict for a judgment of acquittal, on the grounds that the specific ruling upon which the 1950 acquittal had been made was conclusive, saying, ". . . That acquittal, however, does not protect defendant from a conviction in the present case." *United States v. Waldin*, 149 F. Supp. 912, 915.

An appeal was taken from the judgment of conviction and judgment was affirmed, one judge dissenting, (App. A, p. A1, *infra*). A petition for rehearing was filed which *inter alia* raised the point that the statute of limitations had expired. The petitioner had previously raised the question of the statute of limitations in a motion to dismiss the indictment, although the thrust of his argument then was directed against other violations that were included in the indictment. *United States v. Waldin*, 138 F. Supp. 791, 793. A *per curiam* opinion denied the petition for rehearing, with three judges dissenting (App. C, p. A14, *infra*).

REASONS FOR GRANTING THE WRIT.

Important questions of federal criminal law concerning the doctrine of *res judicata*, statute of limitations and due process which are constantly occurring and are present in this case have been decided in a way in conflict with applicable decisions of this Court and present important questions of justice which require review by this Court.

First. *Res Judicata.* Under a long line of cases, it was settled that in criminal cases as well as civil, where

both parties have had their day in court, questions of fact and law distinctly put in issue and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties even if the second suit is for a different cause of action. *United States v. Munsingwear, Inc.*, 340 U. S. 36. Justice Frankfurter, in *Angel v. Bullington*, 330 U. S. 183, 192-3 (1947) stated the reason for this rule as follows: "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion . . . and it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

In this case admittedly what was decided in the 1949 prosecution was that the petitioner was not "acting under the authority of the United States", and he was acquitted. Of course, a prior acquittal of the substantive offense does not ordinarily preclude a prosecution for a conspiracy to commit the same substantive offense, but in this case, where the offenses under Clause (4) and Clause (10) of Section 4047(e) of the Internal Revenue Code of 1939, albeit different crimes, have a common element, namely, that the offender must be an "officer or agent appointed and acting under the authority of any revenue law of the United States" a judicial ruling that the petitioner did not act under authority of any revenue law is conclusive in his favor on the same question concerning the same transaction in the second prosecution—this case.

The significance that an essential element of both offenses had been litigated, and that it was judicially determined that he was not acting under the authority of any revenue law of the United States, was completely ignored by the majority of the court below. The present case was tried on the same facts as the first prosecution and on the same statute, although a different sub-section. The 1955 indictment charged that the petitioner was "an

officer and employee . . . duly appointed and acting under the authority of the Revenue Laws of the United States" (App. 4a) and the trial court submitted the case to the jury in the following language:

> "The defendant here has been indicted under an Act of Congress which reads in part as follows:
>
> > 'Every officer or agent appointed and acting under the authority of any revenue law of the United States who conspires or colludes with any person to defraud the United States shall be fined and shall be imprisoned,'
>
> and so forth. That is, of course, the statute under which the defendant here has been indicted and on which this case has been tried." (Typewritten Transcript p. 217).

The majority members of the court below avoided the *res judicata* problem, treating it as if it were one of double jeopardy[1] by judicially eliminating the requirement from the statute that the offender must be "an officer or agent acting under the authority of any revenue law of the United States" stating, "But we think that the language describ-

1. Justice Holmes in *United States v. Oppenheimer*, 242 U. S. 85, 88, stated: "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." Justice Brandeis, citing *Oppenheimer*, declared: "It is true that the 5th Amendment, in providing against double jeopardy, was not intended to supplant the fundamental principle of res judicata in criminal cases. . . ." *Collins v. Loisel*, 262 U. S. 426, 430. In *Yanow v. United States*, 244 F. 2d 235 (C. A. 5, 1957), the Court there did not treat a *res judicata* problem as if it were one of double jeopardy and held that where a defendant had been acquitted on the substantive charge of unlawful possession of a still, the government could not establish the fact of possession in a subsequent prosecution for conspiracy.

ing conspiracy as forbidden conduct does not require any such qualifications and we do not think we should put it into the statute." (Appendix A, p. A4, *infra*).

Difficult legal questions should not yield to such sweeping-under-the-rug technique. Congress did put these qualifications in the statute and the words mean exactly what they say. The majority interpretation is sheer fiction and is plainly refuted by the literal language. The well known rule that criminal statutes should be interpreted "according to the natural and obvious import of the language without resorting to subtle and forced construction for the purposes of either eliminating or extending its operation" was here disregarded. *United States v. Temple*, 105 U. S. 97, 99.

Tested by the foregoing standards, it is plain that the 1955 prosecution—this case—does violence to the most elementary principles of *res judicata* in criminal cases.

Second. *Statute of Limitations.* Petitioner was convicted of violating § 4047(e)(4) of the Internal Revenue Code of 1939. He had been indicted September 20, 1955 (App. 1a). The indictment charged the petitioner with the violation of § 4047(e)(4), § 145(b) of the Internal Revenue Code of 1939, and § 371 of Title 18 U. S. C. A. (App. 3a-8a). It alleged that the conspiracy commenced on or about April 20, 1949 and continued up to and including October 7, 1949. At the conclusion of the government's evidence, the conspiracy to violate § 371 of Title 18 and § 145(b) of the Internal Revenue Code, was dropped on the government's motion, the government conceding that there was no tax due (Typewritten transcript of testimony p. 130). Petitioner renewed his motion for judgment of acquittal at the conclusion of the entire evidence, which was denied, and submitted the following point for binding instructions, "Under all the law and evidence of this case you must bring in a verdict of not guilty." This point was refused (App. 141a-143a).

The *per curiam* opinion of the court below believed that Sec. 201 of the Miscellaneous Title amended the Internal Revenue Code of 1954 (Appendix C, p. A11, *infra*). But it is Sec. 3748(a) of the Internal Revenue Code of 1939 that is amended (Appendix E, p. A20, *infra*). This Amendment clearly indicates that Congress extended from three to five years the period during which *all violations* of 26 U. S. C. A. Sec. 4047(e)(4) of the Internal Revenue Code of 1939, against which the three year statute had not *yet* run, could be prosecuted, not merely "certain instances," as the *per curiam* opinion of the court below held. The reason for this specific legislation was because Congress was aware that the statute of limitations for offenses by internal revenue agents under the Internal Revenue Code of 1939 was running out. See discussion of debates quoted in *United States v. Kurzenknabe*, 136 F. Supp. 17 (D. C. D. N. J. 1955). For offenses by revenue agents, occurring *after* August 16, 1954, in Sec. 7214(a) of the Internal Revenue Code of 1954 which amended Sec. 4047(e) of the Internal Revenue Code of 1939, the statute of limitations was *at that time* increased to six years by Sec. 6531(7) of the Internal Revenue Code of 1954. See also § 7851 of the Internal Revenue Code of 1954 (Appendix E, p. A22, *infra*).

In *Mertens Law of Federal Income Taxation Code Commentary*, under Sec. 6531, footnote 8, the following pertinent note is made: "The same general three-year limitations period applied under prior law. I. R. C. (1939), Sec. 3748(a). Also under prior law, a six-year period was provided with regard to the offenses described in (1), (2), (3) and (8) above. The remaining offenses fell under the general three-year limitations period in prior law. The House bill (H. R. 8300, 83rd Cong., 2d Sess.) made these changes initially, viz., the six-year limitation period was provided for the willful failure to pay the tax or to make a return; for willfully filing a false or fraudulent return or other document; for corrupt or forcible interference with

the administration of the internal revenue laws; and for certain offenses committed by officers and employees of the United States. The Senate Finance Committee amended the House bill to restore prior law in these areas (see Sen. Rep. No. 1622, 83rd Cong., 2nd Sess. pp. 587-588) but the House provisions were restored in conference. See H. Rep. No. 2543, 83rd Cong., 2nd Sess., p. 79."

It is therefore most difficult to follow the reasoning of the *per curiam* opinion of the court below. Its strained and tortured interpretation is plainly refuted by the literal language and meaning of the Amendment. The words "except that the period of limitation shall be five years for offenses enumerated in Sec. 4047(e) relating to unlawful acts of revenue officers or agents" mean exactly what they say. No other meaning should be squeezed out. The familiar rule that criminal statutes are to be strictly construed is here ignored.

Furthermore, paragraph 1 of Sec. 3748, 26 U. S. C. A., since it concerns statutory crimes, should be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace "so-called frauds not so denominated by the statutes creating offenses". *United States v. Scharton*, 285 U. S. 518, 522. In *Grunewald v. United States*, 353 U. S. 391, this Court reviewed convictions for conspiring to defraud the United States with reference to certain tax matters. One of the counts was brought under 18 U. S. C. § 371. The applicable statute of limitations for that offense was admittedly governed by the three-year statute of limitations at that time. If the *per curiam* opinion of the court below is correct, neither the government nor this Court would have applied the short three-year statute of limitations[2] to an indictment which charged, *inter*

[2] *United States v. Witt*, 215 F. 2d 580, 584 (C. A. 1 1954), decided September 7, 1954 the Court there did state that the statute of limitations applicable under 26 U. S. C. 4047(3)(4) is six years. But the six-year statute of limitations applied to those types of offenses only after August 16, 1954 (Appendix E, p. A22, *infra*). That statement was not necessary for the decision. One of the defendants had

alia: "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws from bribing, unlawful impairment, obstruction, improper dishonesty, fraud and corruption * * *."

Bolich, one of the conspirators in the above case, was also indicted on a second count, charging him with a conspiracy to defraud the United States in violation of 26 U. S. C. A. § 4047(e)(4). The trial court submitted this count to the jury under the following instructions:

> "The second count of the indictment charges a violation of Section 4047(e)(4) of the Internal Revenue Code which makes it a crime specifically for a revenue officer or agent to conspire to collude with any other person to defraud the United States, and provides that any revenue officer or agent who does so shall be punished as provided in that particular section of the statute. In other words, an internal revenue officer or agent who enters into such a conspiracy may be found guilty not alone of a violation of the general statute against criminal conspiracies but also of this particular provision of the Internal Revenue Code. Under this particular section of the statute, it is not necessary that the government prove any overt act. The Statute of Limitations is five years and not three years. The evidence has shown that Bolich, Steinberg and Scherm

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contended that since 26 U. S. C. § 4047(e)(4) related solely to crimes by revenue agents and he had ceased to be a revenue agent, that when the indictment was filed, on April 14, 1953, the three-year statute of limitations, 18 U. S. C. § 3282 had run. The Court held that since he was liable as a private person under 18 U. S. C. § 371, and that he was a party to the conspiracy subsequent to April 14, 1950, the three-year statute of limitations had not run in his favor when the indictment was filed. The Court noted: "As the indictment stated that he ceased to be a revenue agent in 1947, and cited 18 U. S. C. § 371, we think it sufficiently charged him in his capacity as a private person." (footnote omitted).

were internal revenue officers or agents within the meaning of the Internal Revenue Code.

* * *

"In order to return a verdict of guilty as to any defendant named in the second count of the indictment, you must find, beyond a reasonable doubt, that he was an officer or agent of the Bureau of Internal Revenue, and that while acting as such officer or agent, he became a member of the conspiracy to defraud the United States, as alleged in this count of the indictment.

* * *

"The Statute of Limitations on this count is five years; that is, the indictment must have been returned within five years of the commission of the crime. The indictment in this case was returned on October 25, 1954. Therefore, I charge you that to return a verdict of guilty as to any defendant on this count, you must find from the evidence beyond a reasonable doubt, that the defendant was a member of the conspiracy as alleged in this count on and after October 25, 1949, and that he was an official of the Bureau of Internal Revenue at such time." (R 739-741)

The government in the above case never contended that the statute of limitations was six years rather than five.

The *per curiam* opinion further held that the statute of limitations, even if it were a defense, was waived because petitioner raised it for the first time in a petition for rehearing. Three cases were cited in support of this theory. The reliance by the majority of the court below in these cases is surely misplaced. In *Forthoffer v. Swope*, 103 F. 2d 707 (C. A. 9, 1939), the defendant *had pleaded guilty* to the crime charged in the indictment. The Court stated: "A plea of the statute of limitations is a plea in bar; it may be raised by a special plea but, on the other hand, it is also in issue under a plea of not guilty. . . . The defense is available on appeal, but cannot be considered on appeal where not urged in the trial court."

United States v. Franklin, 188 F. 2d 182, 186, 187, (C. A. 7, 1951), concerned a continuing wilful violation of the law, and the Court there stated: "The defendant's failure to register was a continuing wilful violation of the law, and his plea of the statute of limitations has no merit." The Court did remark: "A plea of the statute of limitations is a plea in bar and should be presented to and passed upon by the trial court. *United States v. Kaiser*, 7 Cir., 138 F. 2d 219." But the *Kaiser* case cited as authority involved the affirmative defense of entrapment, which was never raised in the trial court since the defendant there relied upon an alibi.

In *Pruett v. United States*, 3 F. 2d 353, 356, (C. A. 9, 1925), the Court there stated:

> "The embezzlement was conceded and the only other defense available to the plaintiff in error was the defense of statute of limitations. The question was not raised in the court below, at the close of all the testimony, by motion for a directed verdict or otherwise, and the question is therefore not properly before us for review. But, assuming that the defense of statute of limitations is sufficiently favored to justify an appellate court in considering it, where not properly raised below, we do not think that the defense was established in this case as a matter of law."

In the present case the petitioner *did ask for a directed verdict* at the conclusion of the entire evidence, which the trial court refused (App. 141a, 143a). In *United States v. Browne*, 225 F. 2d 751, 755 (C. A. 7, 1955), the Court there stated, in answer to the argument that the defendant had waived venue:[4]

4. There is respectable authority that the defense of the statute of limitations *now* cannot be raised by a motion to dismiss. *United States v. Parrino*, 203 F. 2d 284 (C. A. 2, 1953). Indeed the government relied on this case in opposing a motion to dismiss in *United States v. J. R. Watkins Co.*, 16 F. R. D. 292 (D. C. D. Minn.). The Court there held that the statute of limitations could be raised either

"It appears that the defendant made only a general motion for a directed verdict and the government asserts that proof of venue was waived by failure to specifically designate such failure as a basis for such verdict. Again, United States v. Jones has decided this question adversely to the government's contention. In doing so the court stated, 174 F. 2d at page 748:

> 'The motion for a directed verdict raises the question as to the sufficiency of the evidence to support the verdict of a jury or finding of the court. One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it, there can be no conviction. (Citing cases.)' "

Surely questions of statute of limitations are just as important as venue in criminal cases. In *Wharton's Criminal Evidence* (12th ed.) vol. 1, 64, the following statement is made: "Statutes of limitation in criminal cases are regarded not as statutes of repose as in civil cases, but as creating a bar to the prosecution, and the time within which an offense is committed becomes a jurisdictional fact in all cases subject to limitation." (Footnote citing cases.)

Chief Judge Biggs, writing for the minority in the dissenting opinion, stated, "The view that the charge of the indictment is barred by the statute of limitations is therefore a clearly supportable one.' (Appendix C, p. A18, *infra*). We submit that the dissenting judges were clearly correct.

Third. *Due Process.* If the essence of due process[5] is "fair play," we believe that, five separate successive indictments from year to year, from 1950 to 1955, each a variation on the same theme, in a persistent effort to pun-

before or at the trial of the general issue. In *Askins v. United States*, 251 F. 2d 909 (D. C. Cir. 1958) the Court there held that the statute of limitations could be raised for the first time under 28 U. S. C. § 2255 even to attack a sentence.

5. *Galvan v. Press*, 347 U. S. 522, 550.

ish the petitioner, who was acquitted in 1950, had three indictments dismissed, and after a one-man conspiracy indictment, two-thirds of which at the trial was dropped, and what remained was in essence the 1950 trial, was convicted and sentenced to imprisonment, shockingly violates our traditional concept of fair play. This is double jeopardy doubled.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April, 1958.

APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued November 22, 1957

Before GOODRICH, McLAUGHLIN and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 14, 1958)

By GOODRICH, *Circuit Judge*.

This is an appeal by a defendant who was convicted of violating § 4047(c)(4) of the Internal Revenue Code of 1939. The most important question raised is whether on the facts proved in the case for the government a verdict of guilty under this subsection can be sustained.

The defendant, at the time of the acts charged against him, was a deputy collector for the Bureau of Internal Revenue. His business was to collect unpaid taxes owed by

taxpayers in the zone in Philadelphia to which he was assigned. By virtue of his position he had no authority to compromise or settle claims, nor did he have any authority to have anything to do with the accounts of taxpayers who resided outside his district. The proof adduced by the government against the defendant was that he conspired with persons unknown to induce a taxpayer, named Dr. Mogavero, to pay $20,000 in cash to the defendant and others in order to forestall the prosecution for income tax evasion which the doctor was given to understand was to be brought against him. Dr. Mogavero did not live in the district where defendant operated. It was not shown that either defendant or any of the persons alleged to be involved in the conspiracy had any authority to settle cases, stop prosecutions or furnish other of the alleged protective devices that the doctor was offered. But the evidence presented could lead to the conclusion that an object of the conspiracy was improperly to influence government officials who did have the capacity to do these things, and that at the very least the defendant himself was corrupted as a result of the illegal agreement. There was testimony, also, which the jury could believe, that the conspiracy reached the place where $20,000 in cash was actually put by the doctor into the defendant's hands just before the latter was apprehended.

On these facts may the conviction of the defendant be sustained? Section 4047(e) lists ten "unlawful acts of revenue officers or agents." They differ in description and it is a dangerous generalization to say that the same rules apply to all of them.[1] For instance, clause (1) describes, as a subject for punishment, an agent "who is guilty of any extortion or willful oppression under color of law." Clause (3) penalizes an officer "who willfully neglects to perform any of the duties enjoined on him by law."

Clause (4) is the one here concerned. The opening words of § 4047(e) describe the persons to whom (e) is

1. As was done in United States v. Gerdel, 103 F. Supp. 635 (E. D. Mo. 1952).

applicable. The words are: "Every officer or agent appointed and acting under the authority of any revenue law of the United States . . ." The words of clause (4), with which we are involved here, are: "Who conspires or colludes with any other person to defraud the United States . . ." Then follow other provisions, with the penalty of fine and imprisonment specified in the closing lines of the section.

That a conspiracy to stop prosecution for tax violation and to corrupt government employees is a conspiracy to defraud the United States we think no one would doubt. But can a revenue agent who has no official authority to start or stop a prosecution or, as a matter of fact, to do anything affecting a particular taxpayer's account, violate the section when he does what the jury could have found the defendant did here in concert with strangers totally outside the service? We think that it is enough that a defendant who is in fact a revenue officer shows his own corruption or intent to corrupt the service by participating in an unlawful project which concerns an internal revenue matter.

A similar argument is made that, notwithstanding actual authority, in order to give the phrase "officer or agent appointed or acting under the authority of any revenue law" full effect, it should be interpreted to mean that the agent at least must purport to act as a revenue officer at the time he enters into the conspiracy. To this there are two answers. One is that even without the appellant's gloss the words themselves are not two ways of saying the same thing. A man may be appointed and not be acting either because he has not qualified or because he is away on sick leave or something of the kind. The other answer is that when the Congress meant to require that the revenue officer be acting under purported authority or color of authority it said so as it did in clause (1) which deals with extortion.

The point here involved is not settled by authority. Judge Ganey, when this defendant was prosecuted under clause (10) of the section, thought that under this clause for an agent to be convicted he must have had authority, or at least color of authority, "to compromise, adjust or settle the taxpayer's violation or alleged violation of law." *United States v. Waldin*, 136 F. Supp. 156, 158 (E. D. Pa. 1951). But the conduct described in that particular clause (10) is much more definite and narrow than the conduct proscribed in the clause which we are now considering.

Judge Lord, in an opinion rendered upon a motion to dismiss earlier in these proceedings (138 F. Supp. 791, 795-96 (E. D. Pa. 1956)), thought that the clause involved here was applicable to an agent whether he pretended to act in his capacity as agent or not and whether he made known his authority or purported authority to the taxpayer.

We think Judge Lord was right in holding this particular part of § 4047 applicable to a revenue agent who does the forbidden things. It is quite clear that subsection (e) of 4047 has to do with conduct forbidden to revenue officers and agents. It purports to impose sanctions for a departure from standards of conduct applicable to their offices. It covers quite a number of types of forbidden conduct. When the lawmakers wanted to put the requirement that the person act under color of office in order to commit the offense they said so. In other clauses the very nature of the forbidden conduct would involve a representation at least on the part of the agent that he was acting in his official capacity. This was Judge Ganey's case in the prosecution under clause (10).

But we think that the language describing conspiracy as forbidden conduct does not require any such qualifications and we do not think we should put it into the statute.

The point just discussed was squarely raised by counsel for the defendant in a requested instruction which said:

> "If you find beyond a reasonable doubt that there was in existence a conspiracy and that the defendant was one of the conspirators, you must find that any acts of the defendant were done while he was acting under the authority of his office before you can find the defendant guilty as charged of violation of 26 U. S. C. A. Section 4047(e)(4), and also you must find the defendant entered into the conspiracy while acting under the color of authority of his office."

Judge Grim, who tried the case, denied this request and in denying defendant's motion for a new trial relied upon what Judge Lord had decided in denying the motion to dismiss, 149 F. Supp. 912 (E. D. Pa. 1957).

We agree with Judge Lord and Grim so far as clause (4) is concerned. The view we take makes it immaterial whether Dr. Mogavero believed or did not believe that the defendant was an agent of the department acting within his authority, was an agent of the department acting outside his authority, or was an agent at all. It is sufficient that the defendant was in fact a revenue agent at the time of what the jury found was the misconduct.

The defendant makes a further contention that error was committed when the judge did not strike out evidence relating to the payment of the $20,000. When the defendant was tried under clause (10) before Judge Ganey, the money which was used in the transaction and a list of the serial numbers on the bills were in court and presented in evidence. In the meantime, the money had been returned to Dr. Mogavero and the list of serial numbers on the bills had been lost. Now defendant urges that if the money itself was not produced evidence concerning it should have been refused or stricken out.

At the trial there was testimony from three government agents about this money. They described going to the bank with Dr. Mogavero and getting the money, checking the amounts, making a list of the serial numbers,

wrapping the currency in paper and giving the package to the doctor just a short time before the doctor handed it to the defendant. This testimony, it should be emphasized, came from the very persons who had done all these things with the money.

The only basis on which defendant's motion could be sustained is to allege that there is such a thing as a best evidence rule that requires in every law suit the best possible evidence to prove a given point. There is no such rule and all the modern authorities say so. The confusion got into the law when Baron Gilbert back in 1726 made some incautious statements broad enough to be the basis for misunderstanding of what "the best evidence rule" is. The rule itself is properly confined to writings and is so understood by all the well considered authorities.[2] It may well have been that had the money and the list been produced the testimony might have been stronger, although the jury found it strong enough. There was no error by the trial judge in this.

The defendant also complained of the refusal of the judge to give a requested instruction on entrapment. There are two answers to this objection. One is that any suggestion of entrapment on the evidence is so thin as to be almost fanciful. Another answer is that the instruction was phrased in terms which took the entrapment question out of the hands of the jury on an insufficient basis of fact. There is nothing to the entrapment point.

The judgment of the district court will be affirmed.

HASTIE, *Circuit Judge*, dissenting.

I dissent because, in my view, correct application of the doctrine of res judicata to the circumstances of this prosecution requires that an acquittal be directed.

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2. MCCORMICK, EVIDENCE §§ 195, 196 (1954); 4 WIGMORE, EVIDENCE §§ 1174(1), 1179-85 (3d ed. 1940).

The wrongdoing charged was a scheme to mulct a delinquent taxpayer under pretense of protecting him from governmental action, in the course of which appellant, a deputy collector of the Bureau of Internal Revenue, is said to have solicited and accepted money from the taxpayer. This occurred in 1949. From year to year, from 1950 to 1955, the government obtained a series of five separate indictments in a persistent effort to punish appellant for this misconduct.

Appellant was first indicted, tried and convicted in 1950 on a charge of accepting money to compromise a complaint of violation of law. But, for reasons to be discussed later, the trial judge thereafter granted a defense motion for judgment of acquittal. The same transaction was the basis of a second indictment in 1952 for illegally accepting compensation, and a third indictment of rather similar tenor a year later. These indictments were dismissed in 1953 and 1954. The fourth indictment to be based on this transaction, this time for conspiracy to defeat income taxes, was handed down in 1955. Later in 1955 a fifth indictment initiated the present prosecution for conspiracy to defraud the United States. A jury found the accused guilty as charged. The court then considered and denied a defense motion for judgment of acquittal which urged that the specific ruling upon which the 1950 acquittal had been based was conclusive and required acquittal in this subsequent prosecution.

This brings us to the identification of the specific matter which was so decided in the first prosecution as to require an acquittal, but was relitigated and decided against the accused as an essential element of the crime charged in the present case. That question is, whether, in the 1949 transaction which was the common evidentiary basis of both prosecutions, the accused was "acting under the authority of any revenue law of the United States." It was common to both prosecutions because the successive

indictments were based on clauses (10) and (4), respectively, of the same subsection, § 4047 (e) of the Internal Revenue Code of 1939, which reads as follows:

> "(e) Other unlawful acts of revenue officers or agents. Every officer or agent appointed and acting under the authority of any revenue law of the United States—
>
> . . .
>
> "(4) Who conspires or colludes with any other person to defraud the United States; or
>
> . . .
>
> "(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do—
>
> shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years."

It will be observed that while offenses under clause (4) and clause (10) are different crimes, they, like all other offenses under § 4047 (e), have a common element, namely, the requirement, so stated at the beginning of the subsection as to qualify all of its clauses, that the offender must be an "officer or agent appointed and acting under the authority of any revenue law of the United States." When the existence of this prerequisite status or relationship was challenged on the motion for acquittal after the guilty verdict in the first prosecution, the trial judge wrote an opinion explicitly stating the ground upon which he was directing an acquittal. He said:

"[T]he defendant contends that before an agent of the Bureau of Internal Revenue can be found guilty under Sec. 4047 (e) (10) of the Internal Revenue Code, the government must prove that at the time the agent demanded or accepted the money he must be acting under the authority of the revenue laws. Against the motion, the attorney for the government argues that the agent need not be acting under the authority of law at the critical time in order to convict him. In other words, he maintains that the words: 'and acting under the authority of any revenue law of the United States' in the Code means 'and during his appointment'. We cannot agree. The words of the section are plain. Before an agent can be convicted under it, he must have authority, or at least color of authority, to compromise, adjust or settle the taxpayer's violation or alleged violation of law" *United States v. Waldin*, 1951, 139 F. Supp. 156, 158.

Thus, the accused was acquitted on the specific ground that in the 1949 transaction he was not "acting under the authority of any revenue law of the United States."

Six years later, when the same factual picture of this individual's role and status in that transaction was shown as an essential part of the government's case in the present prosecution, the accused urged the earlier ruling in his favor on the same point as a ground for acquittal. The court, a different judge sitting, again considered the matter on its merits and, disagreeing with the earlier ruling, sanctioned a conviction. The court said:

"In a previous case in this court defendant was charged with and convicted of a violation of subsection (10) of 26 U. S. C. A. former Sec. 4047 in accepting illegally the $20,000 which apparently the jury in the present case also found that he accepted. The trial judge in the previous case granted judgment of ac-

quittal, U. S. v. Waldin, E. C. E. D. 1951, 139 F. Supp. 156. That acquittal, however, does not protect defendant from a conviction in the present case. In the present case defendant is charged with a conspiracy rather than a substantive crime and an acquittal on a charge of a substantive crime does not preclude a prosecution of a conspiracy to commit the same substantive crime." *United States v. Waldin*, 1957, 149 F. Supp. 912, 915.

The quoted language also seems essentially the position of the majority on this appeal. Its error, as I see it, is in treating a *res judicata* problem as if it were one of double jeopardy. The fact that the two contradictory rulings of the district court were made in prosecutions for different offenses, albeit based upon the same transaction, has force in preventing the second conviction from offending the constitutional guarantee against twice being put in jeopardy for the same offense. But the reach of *res judicata* in criminal cases is greater. Even though the successive prosecutions be for different crimes, a ruling favorable to the accused on the facts or the legal significance of a particular transaction in the one prosecution is conclusive in his favor on the same question concerning the same transaction in the second prosecution. See 2 FREEMAN, JUDGMENTS, 5th ed. 1925, § 648; DANGEL, CRIMINAL LAW, 1951, § 187; Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 1954, 39 IOWA L. REV. 317.

The courts have repeatedly stated this doctrine of *res judicata* in criminal cases. There is the plain statement in *Frank v. Mangum*, 1915, 237 U. S. 309, 334, that, in criminal cases as well as civil, "a question of fact or law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties." So, a ruling, whether right or wrong, that a particular short statute of limitations has barred

prosecution for certain misconduct, is *res judicata*. *United States v. Oppenheimer*, 1916, 242 U. S. 85. True, the well known recent application of *res judicata* to a prosecution in *Sealfon v. United States*, 1948, 332 U. S. 575, involved an issue of fact. But the burden of the opinion is that *res judicata* applies to any issue actually decided, without any suggestion that it matters whether the litigants have contested a law point or a matter of evidence. So too, in this circuit, I understand the announced and considered rule to be broadly against the relitigation in a second prosecution of issues or matters of whatever sort actually decided in favor of the accused in an earlier prosecution. *United States v. De Angelo*, 3d Cir. 1943, 138 F. 2d 466; *United States v. McConnell*, E. D. Pa. 1926, 10 F. 2d 977.

The prosecution, recognizing that it is in difficulty on this score, urges in its brief that so much of the judicially stated and repeatedly restated rule as applies to adjudication which has turned on a point of law is dictum in the cases and, therefore, that we should treat this question as one of first impression.[1] Of course, what is ordinarily called a ruling of law on an issue of criminal liability is not a pronouncement of doctrine at large, but a decision as to the legal significance of what happened on a given occasion.

1. This is what the government argues:

"The government concedes that it is unquestionably the law that the prosecution may be prohibited by the doctrine of *res judicata* from proving facts which were conclusively determined adversely to the prosecution by the verdict of the jury in a previous trial for a different offense arising out of the same transaction. We are not prepared, however, to admit that the same rule is applicable with respect to questions of law decided by the Court in an earlier proceeding. We are familiar with dicta in a long line of cases beginning with *Frank v. Mangum, supra*, which say that *res judicata* is applicable to questions of fact and law in criminal cases. However, we have been unable to find one case in which the doctrine was the basis for a Holding establishing conclusiveness of a decision on a legal issue by the Court in a previous trial for a different offense. We therefore respectfully submit that the question is one of first impression and should be treated as such by this Court." Appellee's Brief, pp. 24-25.

And whether the actual dispute concerns the operative facts or the legal rule applicable to them, or both, *res judicata*, if applicable at all, comprehends the particular matter decided; in this case that the accused did not act under authority of any revenue law in the 1949 transaction. It does not matter whether the controversial factor which determined this ruling was the court's evaluation of the evidence or its interpretation of the controlling language of the statute. The important thing is that the court ruled that an essential element of the crime, as stated in the statute, had not been established. The existence of that same element of criminality may not later be proved against the accused to subject him to liability for another offense charged on the basis of the same transaction.

We should not be distressed that this rule may occasionally, perhaps this time, permit a wrongdoer to escape punishment. For it is the deliberate choice of our open society to forego easy and sure convictions of crime—such as the police state can guarantee—in order that the never absent risk of unduly harassing or otherwise oppressive action by government may be minimized. We should rather be concerned that judges not relax the procedural safeguards of our system whatever the record may suggest as to the demerits of the accused.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, McLAUGHLIN and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated:

February 14, 1958.

APPENDIX C.

Opinions Below Sur Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,
Appellant.

SUR PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 9, 1958)

PER CURIAM

In a petition for rehearing the defendant raises for the first time the point that the statute of limitations bars this prosecution. There is good authority which holds that this objection comes too late when presented at this stage. *Forthoffer v. Swope*, 103 F. 2d 707 (9th Cir. 1939); *Pruett v.*

United States, 3 F. 2d 353 (9th Cir. 1925); *cf. United States v. Franklin*, 188 F. 2d 182 (7th Cir. 1951).

Regardless of timeliness, however, we think the contention has no merit. 26 U. S. C. A. § 3748 provides:

> "(a) CRIMINAL PROSECUTIONS. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> "(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,"

Paragraph (1) covers the charge here involved as the opinion of the court, filed February 14, 1958, shows.

In accord with our conclusion is *United States v. Witt*, 215 F. 2d 580 (2d Cir. 1954), which the defendant believes to be wrong but which we think is right. *Grunewald v. United States*, 353 U. S. 391 (1957), cited to us, was a prosecution under 18 U. S. C. § 371, and is not in point here.

The final question is whether § 201 of the Miscellaneous Title to the Internal Revenue Code of 1954, 68A STAT. 929 decreased the period applicable to violations of 26 U. S. C. A. § 4047(c)(4) from six to five years. We think not. We agree with the Government that the purpose was to increase the period of limitations from three to five years in certain instances, but not to decrease the limit as to those offenses which were already covered by the six-year limitation period. This is borne out by such legislative history as there is upon the point. See 100 CONG. REC. 9490-92, 12532-34 (1954); H. R. REP. No. 2543, at 86, 3 U. S. CONG. & ADM. NEWS, 83d Cong., 2d Sess. 5438 (1954).

The petition for rehearing is hereby denied.

BIGGS, *Chief Judge*, dissenting.

The indictment charged the defendant-appellant with a conspiracy to violate Section 4047(e)(4), Title 26, U. S. C. A.[1] It was alleged that the conspiracy continued with the defendant-appellant as a party thereto up to and including October 7, 1949. The indictment was returned on September 20, 1955; therefore more than five and one-half years elapsed between the commission of the offense and the return of the indictment.

Section 3748,[2] 26 U. S. C. A. was amended on August 16, 1954 by Section 201(a), 68 A. Stat. 929, to read as follows:

> "(a) Criminal Prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, *except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents)* and except that the period of limitation shall be six years— [Emphasis added.]
>
> "(1) for offenses involving the defrauding or attempting to defraud the United States or any

1. The indictment also charged the defendant-appellant with other violations but these charges were not pressed and the court below restricted its charge to the conspiracy to violate Section 4047(e)(4), Title 26, U. S. C. A. This court is concerned therefore with the charge of the indictment last designated.

2. The section as originally enacted and quoted in the *per curiam* opinion was:

> "(a) Criminal Prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> "(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner."

agency thereof, whether by conspiracy or not, and in any manner,

. . . .

"(b) Scope of Limitations. Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932."

The *per curiam* opinion of this court concludes that the purpose of this amending section was to increase the period of limitations for those Section 4047(e) violations which had a three year period to five years, but was not intended to decrease the six year limitation period applicable to Section 4047(e)(4) violations to five years. The language of the Section as amended states, however, that the period of limitations shall be five years for Section 4047(e) violations, which include, of course, Section 4047(e)(4) violations. The face of the statute is unambiguous. The conclusion is that the applicable period of limitations should be deemed to be five years in the case at bar. Caminetti v. United States, 242 U. S. 470, 485 (1916); United States v. Mock, 143 F. Supp. 661, 664 (N. D. Cal. 1956).

The *per curiam* opinion, however, goes one step further and concludes that even if the applicable statute of limitations were five years, a defense based on the statute of limitations was waived by the defendant-appellant because he failed to plead or assert it specifically in bar. But statutes of limitations applicable to criminal offenses differ from statutes of limitations in civil actions. In civil actions statutes of limitations are deemed to be mere statutes of repose. In criminal actions statutes of limitations bar prosecution. Wharton, Criminal Evidence § 21; Dangel, Criminal Law § 107. It follows that the protection afforded by a criminal statute of limitations goes to the defendant's liability as a matter of substantive law. United States v. Oppenheimer, 242 U. S. 85 (1916); Hassel v. Mathues, 27 F. 2d 137 (E. D. Pa. 1928). The burden of proving affirma-

tively that the crime was committed within a period not proscribed by the applicable statute of limitations is on the United States. Az Din v. United States, 232 F. 2d 283, 287 (9 Cir. 1956); United States v. Schneiderman, 106 F. Supp. 892 (S. D. Cal. 1952). Accordingly, the authorities are clear that the statute of limitations need not be specifically pleaded, but is put in issue, in criminal cases, by a plea of not guilty. United States v. Brown, Case No. 14,665, 24 Fed. Cases page 1263; United States v. White, Fed. Case No. 16,676, 28 Fed. Cases page 562; United States v. Cook, 84 U. S. 168 (1813); Forthoffer v. Swope, 103 F. 2d 707 (9 Cir. 1939); Housel and Walker, Defending and Prosecuting Federal Criminal Cases § 348. These authorities are applicable since the defendant-appellant entered a plea of not guilty on January 6, 1956. The view that the charge of the indictment is barred by the statute of limitations is therefore a clearly supportable one.

As to the issue of *res judicata*, a most important one, the views stated in Judge Hastie's dissent to the original opinion of this court filed February 14, 1958, seem unanswerable.

For the foregoing reasons I am of the opinion that the case should be reheard before the court en banc.

I am authorized to state that Judge Kalodner and Judge Hastie join in this dissent.

APPENDIX D.

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 12,276

UNITED STATES OF AMERICA

v.

ERNEST T. WALDIN,
Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge;* and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest: IDA O. CRESKOFF,
Clerk.

Dated: April 9, 1958.

APPENDIX E.

Constitutional Provision and Statutes Involved.

The Constitution of the United States, Amendment V, provides, in pertinent part:

No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty or property without due process of law . . .

Internal Revenue Code of 1939:

> Sec. 3748. Periods of Limitations.
>
> (a) Criminal Prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,
>
> • • •
>
> (26 U. S. C. 1952 ed., Sec. 3748.)

Extension of Limitations on Prosecutions of Offenses by Revenue Officers or Agents.

Act of Aug. 16, 1954, C. 736, § 201, 68A Stat. 929.

Sec. 201. (a) Section 3748(a) of the Internal Revenue Code of 1939 (relating to periods of limitations applicable to criminal prosecutions) is amended by inserting after "within three years next after the commission of the of-

fense," the following: "except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and".

(b) The amendment made by this section shall be effective with respect to offenses committed on or before the date of enactment of this Act, if on such date prosecution therefor is not barred by provisions of law in effect before such date.

(26 U. S. C. A. Internal Revenue Acts Beginning 1946, Cumulative Supplement.)

SEC. 4047. PENALTIES.

* * *

(e) Other unlawful acts of revenue officers or agents. Every officer or agent appointed and acting under the authority of any revenue law of the United States—

. . .

(4) Who conspires or colludes with any other person to defraud the United States; or

. . .

(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do—

shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years.

(26 U. S. C. 1952 ed., Sec. 4047.)

INTERNAL REVENUE CODE OF 1954.

Sec. 6531. PERIODS OF LIMITATION OF CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

• • •

(7) for offenses described in section 7214(a) committed by officers and employees of the United States;

• • •

(26 U. S. C. 1952 ed., Supp. II, Sec. 653.)

Sec. 7851. Applicability of Revenue Laws.

(d) PERIODS OF LIMITATION.—All periods of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, hereby repealed shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed, prior to said repeal, may be commenced and prosecuted within the same time as if this title had not been enacted.

(26 U. S. C. 1952 ed., Supp. II, Sec. 7203.)

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No. 930

In the Supreme Court of the United States

OCTOBER TERM, 1957

ERNEST T. WALDEN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	10
Conclusion	20

CITATIONS

Cases:

Az Din v. *United States*, 232 F. 2d 283	20
Benanti v. *United States*, 355 U.S. 96	12
Bridges v. *United States*, 346 U.S. 209	18
Frank v. *Mangum*, 237 U.S. 309	17
Glasser v. *United States*, 315 U.S. 60	11
United States v. *Grunewald, et al.*, 233 F. 2d 556, reversed on other grounds, 353 U.S. 391	14
Hammerschmidt v. *United States*, 265 U.S. 182	11
Pruett v. *United States*, 3 F. 2d 353	19
Sealfon v. *United States*, 332 U.S. 575	16
United States v. *Adams*, 281 U.S. 202	17
United States v. *Barber*, 219 U.S. 72	19
United States v. *Franklin*, 188 F. 2d 182	19
United States v. *Gerdel*, 103 F. Supp. 635	13
United States v. *Kissel*, 218 U.S. 601	20
United States v. *Moser*, 266 U.S. 236	17
United States v. *Narvaez-Granillo*, 119 F. Supp. 556	20
United States v. *Oppenheimer*, 242 U.S. 85	17, 20
United States v. *Schneiderman*, 106 F. Supp. 892	20
United States v. *Waldin*, 122 F. Supp. 903	9
United States v. *Waldin*, 139 F. Supp. 156	2, 9, 10, 14-15, 16
United States v. *Warren*, 120 F. 2d 211	14
Wade v. *Hunter*, 336 U.S. 684	20

Statutes:

18 U.S.C. (1946 ed., Supp. V) 371	8, 10, 18
18 U.S.C. 3282	18
26 U.S.C. (1946 ed.) 145(b)	8, 9, 10

Statutes—Continued

Page

26 U.S.C. (1946 ed.) 3748(a) 2, 18
26 U.S.C. (1946 ed.) 3748(a), as amended by Section 201(a), Miscellaneous Title, Internal Revenue Code of 1954, 68A Stat. 929 ..... 3, 17, 19
26 U.S.C. (1946 ed.) 4047(e):
(1), (2), (3), (4), (5), (6), (7), (8), (9), (10) 13-14
(4) 3-4, 8, 9, 10, 11, 12, 14, 16, 17, 18
(10) 4, 9, 16, 17
26 U.S.C. (Supp. V) 6531(7) 17
26 U.S.C., (Supp. V), 7214(a) 14
26 U.S.C., Section 7851(d) 17, 18

Miscellaneous:

Hearings of April 21, 1954, Committee on the Judiciary, 83rd Cong., 2d Sess., p. 5 19
S. 1451, 83d Cong., 1st Sess. 18
S. 3310, 3d Cong., 2d Sess. 18, 19
Senate Report, U.S. Code Cong. and Adm. News, 1954, p. 5254-5255 14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 930

ERNEST T. WALDIN, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals, initially and on rehearing (Pet. App. A1-A12, A14-A18), have not yet been reported. The opinions of the district court denying petitioner's motion to dismiss the indictment (R. 9-19) and motion for judgment of acquittal (R. 146-152) are reported at 138 F. Supp. 791 and 149 F. Supp. 912.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1958 (Pet. App. A. 13). A petition for rehearing was denied on April 9, 1958 (Pet. App.,

A 19). The petition for a writ of certiorari was filed on April 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employee of the Bureau of Internal Revenue who conspired to take advantage of his status to solicit and accept $20,000 from a taxpayer, purportedly for the purpose of suppressing an indictment, was properly held to have violated Section 4047(e)(4) of the Internal Revenue Code of 1939 (punishing conspiracy to defraud the United States) although he did not in fact have authority to compromise claims.

2. Whether a prior holding on the same facts (*United States* v. *Waldin*, 139 F. Supp. 156, 158-159), that Section 4047(e)(10) of the Internal Revenue Act of 1939 (punishing attempts to collect money for settling claims) requires proof of color of authority to compromise or settle a taxpayer's alleged violation of law, is *res judicata* on the construction to be placed on Section 4047(e)(4).

3. Whether the Court of Appeals, before which the issue of statute of limitations was first raised on petition for rehearing, properly held that the applicable period was six years.

STATUTES INVOLVED

26 U.S.C. (1946 ed.) 3748(a) provided, in part:

> No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

* * * * *

26 U.S.C. (1946 ed.) 3748(a), as amended by Section 201(a), Miscellaneous Title, Internal Revenue Code of 1954, 68A Stat. 929, read, in part, as follows:

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and except that the period of limitation shall be six years——

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

26 U.S.C. (1946 ed.) 4047(e) provided, in pertinent part:

* * * * *

(e) *Other unlawful acts of revenue officers or agents.* Every officer or agent appointed and acting under the authority of any revenue law of the United States——

* * * * *

(4) Who conspires or colludes with any other person to defraud the United States; or

* * * * *

(10) Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do——

shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years. * * *

STATEMENT

On September 20, 1955, an indictment was filed in the United States District Court for the Eastern District of Pennsylvania which charged, *inter alia*, that petitioner had conspired with unknown persons to defraud the United States of its right to the fair, honest, and disinterested administration of its revenue laws, in violation of 26 U.S.C. (1946 ed.) 4047(e)(4) (R. 3-8). It was the theory of the indictment that petitioner, a Zone Deputy Collector of Internal Revenue in Philadelphia, Pennsylvania, had solicited and accepted $20,000 from a taxpayer, Dr. Francesco Mogavero, in return for which petitioner and his friends were to suppress an allegedly imminent indictment for tax evasion (R. 4-6). After jury trial, petitioner was found guilty (R. 2, 146) and sentenced to two years imprisonment (R. 153). On appeal, the conviction was affirmed, one judge dissenting on the issue of *res judicata*. A

petition for rehearing, which for the first time specifically raised an issue as to the statute of limitations, was considered by a seven-judge panel and denied, three judges dissenting.

1. During the latter part of 1948, the income tax records of Dr. Francesco Mogavero were being examined by revenue agents (R. 24).[1] Dr. Mogavero retained Albert S. Herskowitz, an attorney, for the purpose of ascertaining the amount of the deficiency, if any (R. 25, 45). About the first week in April, 1949, Herskowitz contacted petitioner, a Zone Deputy Collector of Internal Revenue in Philadelphia, told petitioner that he was trying to get information which he could not get from ordinary sources, and asked petitioner to meet him (R. 25-26). Herskowitz took petitioner to Mogavero's office, where the group discussed Mogavero's problem. Petitioner agreed to learn what he could and report back to Herskowitz (R. 26-27). Mogavero had received a telegram from some source reporting that he was going to be indicted, and it was the consensus of opinion among the three that the telegram "was a fake" (R. 36-37). Nonetheless, at that time there was the overhanging threat of indictment (R. 37).

About August 1, 1949, petitioner called Herskowitz and asked him to speak to a friend of petitioner's named McDougal. Petitioner put McDougal on the line and he had a conversation with Herskowitz. Petitioner then came back to the telephone and Herskowitz told petitioner that McDougal had demanded $20,000 to prevent Mogavero's indictment and prosecution for income-tax evasion (R. 27-28). Petitioner replied that

[1] Doctor Mogavero died before this trial (R. 24).

the money was not for either himself or McDougal, but for some other persons who were "* * * going to take care of this thing". He advised Herskowitz that "* * * this would be the best way out * * *" for Mogavero was in serious difficulty. Herskowitz terminated the conversation by telling petitioner that Mogavero's money was not going to be spent for that purpose (R. 29-30).

On September 15, 1949, petitioner called at the home of Dr. Mogavero. In the presence of Mogavero's wife and mother, petitioner told him that "the group" wanted money and also wanted the doctor to discharge Herskowitz because he was rough and crude. In a few minutes the telephone rang (petitioner had advised Mogavero to expect a call) and an unknown person demanded that Mogavero hand over $20,000 in cash. After Mogavero had hung up, petitioner told him that "That is the way the group wants it, and that is the way it has to be done". He gave Mogavero until 7:00 p.m. that evening to make a decision (R. 74-79).

On September 20, 1949, petitioner called Herskowitz and told him that he [petitioner] "* * * had been in touch with Dr. Mogavero, pressing him to accept this proposition of putting up $20,000 to avoid this tax prosecution" (R. 31).

The following day, September 21, 1949, Dr. Mogavero went to the local agents of the intelligence unit of the Internal Revenue Service (R. 46-47). As a result of his conversations with them, agent Edward A. Hill and others were assigned to investigate an alleged extortion by petitioner (R. 48, 50).

About two weeks later, October 5, 1949, Dr. Mogavero obtained $20,000 in cash from his banks and, with the

help of the investigating agents, wrapped it up in a brown sealed package (R. 51, 87-88).

On October 7, 1949, Dr. Mogavero—in possession of the package of money—was seated in his consultation room and three agents, Tucker, DiMaggio and Morris, were posted nearby (R. 60, 64, 90-91). At about 1:00 p.m., petitioner drove up and entered Mogavero's office (R. 52-53). The agents overheard the following conversation between Mogavero and petitioner (R. 65-66, 91-92):

> I heard the voice of Dr. Mogavero say, "Well, here it is. Here is the $20,000. Now, what do I get for it?"
>
> The other voice replied, "Don't worry. You will be shown everything."
>
> Dr. Mogavero continued, "How do I know the whole thing isn't a fake? All along I have wanted you to bring Bill. How do I know I won't be indicted, anyhow?"
>
> The other voice replied, "Don't worry. You will be shown the figures. Everything will be taken care of and you can forget about the indictment. At least I am sure I can guarantee you about the indictment. Those others wouldn't double-cross me."

Seconds later, petitioner walked out of the consultation room with the package of money in his hand. As agents Tucker and DiMaggio stepped forward to apprehend him, petitioner tossed the package behind him into the consultation room. After the arrest was made, petitioner voluntarily said, "I know nothing about this. For all I know the doctor owed my father some money and I was down here to collect it". He also told the agents that he had had a lot of trouble, that his mother

had died, and that his group supervisor would be happy to learn that he "* * * had gotten into a jam" (R. 66-67, 94-95).[2]

The investigation of Doctor Mogavero's tax situation had begun in August 1948 and was continuing as of October 1949 (R. 47). There were indications of a tax deficiency, but the final amount due had not been established and no indictment for income tax evasion was pending (R. 54-55).

During the period of this offense, the principal duties of a zone deputy collector of internal revenue were to collect delinquent taxes and secure delinquent returns within a certain section—in this case, a section of Philadelphia (R. 20-21). Petitioner's zone did not include Doctor Mogavero's residence (R. 23). He did not have official access to the investigation file on Mogavero (R. 55-56).

2. The indictment upon which petitioner's conviction is founded (filed September 20, 1955) charged (1) conspiracy to evade income taxes in violation of 26 U.S.C. (1946 ed.) 145(b) and 18 U.S.C. (1946 ed., Supp. V) 371, and (2) conspiracy to defraud the United States in the fair administration of its internal revenue laws, in violation of 26 U.S.C. (1946 ed.) 4047(e)(4) (R. 3-8).

Prior to trial, petitioner moved to dismiss the indictment,[3] alleging, *inter alia*, that the statute of limita-

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[2] Testifying as a witness, petitioner gave a generally exculpatory explanation of his actions, saying that he advised Mogavero not to pay a $20,000 bribe demanded by persons unknown to petitioner, that he was only holding the money for Mogavero when arrested, and that the doctor "framed" him (R. 102-120). However, petitioner does not in this Court question the sufficiency of the evidence.

[3] He also moved to dismiss an earlier indictment which had been superseded by the present one (R. 9).

tions had run as to the offense laid under 26 U.S.C. (1946 ed.) 145(b) (R. 13). He also urged that the indictment was insufficient to allege an offense under 26 U.S.C. (1946 ed.) 4047(e)(4) for failure to allege that petitioner's fraudulent act was done under the authority of his office (which petitioner contended the statute required) (R. 17-18), and that a prior interpretation of 26 U.S.C. (1946 ed.) 4047(e)(10) was *res judicata* of the interpretation to be given to 26 U.S.C. (1946 ed.) 4047(e)(4).

Petitioner had earlier been indicted, tried, and found guilty by a jury, in 1950, on an indictment—based on the same facts—which alleged that he had violated 26 U.S.C. (1946 ed.) 4047(e)(10) by demanding of, and accepting from Mogavero, the sum of $20,000 as payment for the settlement of an alleged violation of law. Section 4047(e)(10), supra, pp. 3-4, forbids the demanding or accepting of money for the compromise or settlement of any charge or complaint for any violation or alleged violation of law. The district court (Ganey, J.) granted petitioner's motion for judgment of acquittal on the ground that, to be guilty of this offense, an agent of the Internal Revenue Service must have authority or color of authority to compromise, settle, or adjust the taxpayer's alleged violation of law, and that the evidence was clear that petitioner had no such authority or color of authority. *United States* v. *Waldin*, 139 F. Supp. 156, 158-159 (E. D. Pa.). It is this holding [4] which petitioner relies upon as being *res judicata* of the construction to be given Section 4047(e)(4), *supra*.

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[4] Intervening indictments were dismissed for one reason or another, see, for example, *United States* v. *Waldin*, 122 F. Supp. 903 (E.D. Pa.).

In the present case, the district court (Lord, J.) denied the motion in all respects, holding that the statute of limitations applicable to 26 U.S.C. (1946 ed.) 145(b) was six years and not three years; that Section 4047(e)(4), *supra*, required only that petitioner be an employee of the Internal Revenue Department and not that he actually have authority to settle the taxpayer's violation; and that the earlier holding (139 F. Supp. at 158-159, *supra*) was not conclusive of the construction to be given to Section 4047(e)(4), (138 F. Supp. 791; R. 13-16, 18, 19).

At trial, the government conceded that there was no proof of a conspiracy to evade income taxes under 26 U.S.C. (1946 ed.) 145(b) and 18 U.S.C. (1946 ed., Supp. V) 371. The case went to the jury solely on the theory that petitioner had conspired to defraud the United States of its right to have its governmental functions administered honestly under Section 4047 (e)(4), (Pet. 3).

After trial, petitioner moved for a judgment of acquittal, raising the issues of statutory construction and *res judicata* advanced to support his earlier motion to dismiss the indictment. He did not raise any issue concerning the limitation period applicable to Section 4047(e)(4). The motion was denied (149 F. Supp. 912; R. 146-152). The limitation question was first raised in the Court of Appeals on petition for rehearing, where the majority concluded that the objection was not timely and that the applicable limitation period was six years (R. 172-176).

ARGUMENT

1. (a). Petitioner argues this case as though it was one where a person who just happened to be a revenue

officer solicited and accepted a sum of money from a taxpayer while actually acting in his private capacity as a citizen. That is not the situation here.

It is true that there was no showing that petitioner's official position was such that he could compromise Mogavero's tax liability or personally quash any possible indictment. Nonetheless, he was first contacted by Herskowitz because Herskowitz wanted information as to Mogavero's tax deficiency—information not available from ordinary sources or to the public generally—which he thought he could get from petitioner, obviously because of petitioner's status as a revenue officer. Thereafter, petitioner traded on that status by giving Herskowitz and Mogavero expert advice as to the validity of a telegram received by Mogavero, by telephoning Herskowitz with purportedly inside information that Mogavero was going to be indicted, and by soliciting and accepting money on the basis that he could arrange for the suppression of the indictment.

26 U.S.C. (1946 ed.) 4047(e)(4) punished:

> Every officer or agent appointed and acting under the authority of any revenue law of the United States——
>
> * * * * *
>
> (4) who conspires or colludes with any other person to defraud the United States;

It is settled that the United States is defrauded where it is deprived of the honest administration of its functions, *Glasser* v. *United States*, 315 U.S. 60, 66; *Hammerschmidt* v. *United States*, 265 U.S. 182. Here it is clear—even assuming that petitioner is correct in saying that his status as an officer is not enough by itself—that petitioner made affirmative use of that status by

demanding and accepting money on the premise that he was, by virtue of his position, able to suppress (or cause to be suppressed) a tax indictment. Petitioner was trading on his position as a revenue officer. It is proper that he be held to the standard of a revenue officer.

(b). In any event, it is enough to constitute a violation of 4047(e)(4) that petitioner conspired to defraud the United States in connection with the revenue when he was in fact a revenue officer or agent. Section 4047 (e) reflects the philosophy that, because of the special position which they occupy by the very fact of their employment, revenue officers and agents must be held to a standard higher than that for persons outside the service. It draws a distinction between those offenses which result from the power of office—and therefore require proof of power—and those which result merely from the fact that the defendant is a revenue agent, a member of the group which must be above suspicion. The offense here is in the latter category.

26 U.S.C. (1946 ed.) 4047(e), *supra*, pp. 3-4, punishes ten separate acts which may be committed by revenue agents or officers. Five of these offenses, each set forth in a separate subsection, require that there be an official connection between the duties of the officer or agent and the unlawful act. The other five subsections, of which 4047(e)(4) is one, are stated in general terms and contain no such requirement. Clearly, Congress knew how to phrase each subsection so as to require such official connection, and its failure to do so in 4047 (e)(4) is strong evidence of an intent not to require proof of a connection between petitioner's duties and the object of the conspiracy to make out the offense. See *Benanti* v. *United States*, 355 U.S. 96, 165.

Section 4047(e)(1), for example, reads as follows:

> Every officer or agent appointed and acting under the authority of any revenue law of the United States——
>
> (1) who is guilty of any extortion or willful oppression *under color of law*; * * * shall be dismissed from office [etc.]. [Emphasis added.]

Subsection (e)(2) deals with an officer or agent who demands or accepts any compensation other than that prescribed by law "* * * for the performance of any duty"; hence it is logical to conclude that for the purposes of that subsection there must be some connection between the duties of the official and the object of the conspiracy. *United States* v. *Gerdel*, 103 F. Supp. 635 (E. D. Mo.). Similarly, subsection (e)(3) (dealing with the agent "* * * Who willfully neglects to perform any of the duties enjoined on him by law")—subsection (e)(8) (punishing the agent who makes a false book entry or return "* * * where he is by law or regulation required to make any entry, certificate, or return")—and subsection (e)(10) (which reaches the agent who demands or accepts a payment "* * * for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law")—all of necessity require that the revenue official or agent must be in a position where it is at least possible that he can bring about the evil end through official action. However, subsections (e)(4), (5), (6), (7), and (9) cast a different image. They are broader in language and do not depend upon proof that the revenue agent personally has the official authority to suppress indictments.

Subsection 4047(e)(4), the statute violated here, punishes every officer or agent "* * * Who conspires or colludes with any other person to defraud the United States". Subsections (5), (6), (7), and (9) are phrased in equally general terms; they do not require that the agent have the official power to bring about the criminal result. It is enough that the offender be a revenue officer or employee. See *United States* v. *Grunewald, et al.*, 233 F. 2d 556, 567 (C. A. 2), reversed on other grounds, 353 U. S. 391; *United States* v. *Warren*, 120 F. 2d 211 (C. A. 2). The United States is equally defrauded under Section 4047(e)(4) if an agent induces a fellow employee, who does have the authority, to drop a case.

Section 7214(a) of the Internal Revenue Code of 1954 strengthens our argument that a revenue officer need not have the personal power to suppress an indictment and yet may violate Section 4047(e)(4). The new statute reaches "Any officer or employee of the United States acting in connection with any revenue law of the United States." The only change thought significant by the Senate was that from "agent" in the old law to "employee" in the new, for they were the only words italicized in the Senate Report, U. S. Code Cong. and Adm. News, 1954, p. 5254-5255. We think the phrase "* * * acting in connection with any revenue law * * *" merely means that the employee must be, like petitioner, someone engaged in some manner in administering the tax laws.

2. The issue that was before the district court during petitioner's prior trial for violation of Section 4047(e)(10) and which was the basis of the decision is succinctly summarized in the opinion itself, *United States* v. *Waldin*, 139 F. Supp. 156, 158-159:

> In support of his motion for judgment of acquittal, the defendant contends that before an

agent of the Bureau of Internal Revenue can be found guilty under Sec. 4047(e)(10) of the Internal Revenue Code, the government must prove that at the time the agent demanded or accepted the money he must be acting under the authority of the revenue laws. Against the motion, the attorney for the government argues that the agent need not be acting under the authority of law at the critical time in order to convict him. In other words, he maintains that the words: "and acting under the authority of any revenue law of the United States" in the code means, "and during his appointment". We cannot agree. The words of the section are plain. Before an agent can be convicted under it, he must have authority, or at least color of authority, to compromise, adjust or settle the taxpayer's violation or alleged violation of law. It is true that such an interpretation makes this section a duplication of 18 U. S. C. § 202, concerning the acceptance of solicitation of money by employees of the United States for the purpose of having his decision or action in a matter influenced thereby. But we think the greater penalty under Section 4047(e)(10) may have been one of the reasons why this particular section was not repealed by the criminal code of 1948.

Since the defendant in the instant case had no authority or color of authority to compromise, adjust or settle the taxpayer's alleged violation of law, he cannot be indicted under this statute. This conclusion is reached with extreme reluctance, as the defendant's conduct throughout was extremely reprehensible.

This cannot be properly read as holding more than that, for the purpose of subdivision (10) of 4047(e)—

which punishes a revenue agent who demands money "for the compromise, adjustment or settlement of any charge"—the agent must, in the words of the prior opinion, "have authority, or at least color of authority, to compromise, adjust or settle the taxpayer's violation or alleged violation of law." The court was addressing itself to the particular offense before it. It was not deciding that petitioner was not a revenue agent. No more was it deciding what acting "under the authority of any revenue law" meant when the authority related to anything other than the taking of money for adjusting claims.

The prior trial did finally adjudicate as a fact that petitioner lacked authority or color of authority to compromise, adjust, or settle Mogavero's violation or alleged violation of law. That fact was not challenged at this trial. The prior trial also finally adjudicated for petitioner as a matter of law that color of authority to settle was necessary to hold a revenue agent liable for taking money for settling claims. That adjudication of law was not challenged in the present trial. The question here—whether a revenue agent defrauds the United States in violation of subsection (4) when he demands money even though he has no official power to fix the case—was not and could not have been determined at the prior trial where it was not in issue, as a matter of fact or of law.

For this reason, this trial involves no conflict with the principle that, where the second trial is for a *different* offense, issues which were actually litigated and decided in the first trial cannot be relitigated. *Sealfon* v. *United States*, 332 U. S. 575, 578; *United States* v. *Adams*, 281 U. S. 202, 205; see *Frank* v. *Man-*

gum, 237 U. S. 309, 334; cf. *United States* v. *Oppenheimer*, 242 U. S. 85, where an erroneous unappealed judgment, entered before jeopardy attached, that a criminal prosecution was barred by the statute of limitations, was held to bar a second prosecution for the *same* offense. Moreover, *res judicata* does not apply to pure questions of law even between the same parties where the demand in a civil suit is on a wholly different claim, *United States* v. *Moser*, 266 U. S. 236, 242. By analogy, the prior ruling that Section 4047 (e)(10), *supra*, requires a showing of official authority is not binding on the government in a proceeding under Section 4047(e)(4).

3. In his petition for rehearing in the Court of Appeals, petitioner contended for the first time that the prosecution under Section 4047 (e)(4) of the Internal Revenue Code was barred by the statute of limitations. Admittedly, for all offenses committed by revenue officers since enactment of the Internal Revenue Code of 1954, the period of limitations is six years. 26 U.S.C. (Supp. V) 6531(7). Moreover, it is clear that the enactment of the Code of 1954 did not shorten any period of limitations as to prior offenses. Section 7851(d) expressly provides that any offense not barred on the date of the enactment of the 1954 Code shall not be barred because of any provision in the new Code. Section 201(a), Miscellaneous Title, Internal Revenue Code of 1954, 68A Stat. 929 (*supra*, p. 3), did increase the period of limitations for offenses by revenue officers to five years, where the prior period had been three. But there is nothing in its language or legislative history to show that if the limitations period for a prior offense was six years,

the period was to be cut down to five, and as noted above Section 7851(d) clearly indicates the contrary intent.[5] Both prior to and after that amendment, Section 3748(a) provided a six year statute of limitations

> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.[6]

In 1954 there was before the Senate (83d Cong., 1st Sess.) S. 1451 and (83d Cong., 2d Sess.) S. 3310, which were companion bills. S. 1451 would have extended the general statute of limitations (18 U.S.C. 3282) from three to five years. S. 3310 would have extended both the general statute of limitations and the three year provision of Section 3748(a) to five years. It was the opinion of Senators Holland and Johnston, two members of the Subcommittee of the Committee on the Judiciary,

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[5] The petitioner's reliance on *Grunewald* v. *United States*, 353 U.S. 391, (Pet. 8-10) is misplaced. Insofar as that prosecution was under the general conspiracy statute (18 U.S.C. 371), the special limitations of 26 U.S.C. 3748 applicable to revenue offenses are obviously inapplicable. As to the trial court's instructions with respect to the one count brought under 26 U.S.C. 4047 (e) (4) in which the court referred to a five year limitation, the issue there was not between five and six years, but whether the prosecution was barred by the basic three year limitation. On the theory here supported, the limitation for the count in the *Grunewald* case based on § 4047 (e) (4) should have been six rather than five years.

[6] The petitioner makes no claim that in the absence of the 1954 amendment this six year limitation would be inapplicable to the offense here charged. The holding of *Bridges* v. *United States*, 346 U.S. 209, that the wartime suspension of limitations for offenses involving fraud against the United States did not apply to non-pecuniary fraud is not applicable here. The Court's construction was based on the purpose of the specific suspension law and, in any event, any fraud in relation to the administration of the revenue laws has a pecuniary aspect.

which held hearings on the bills, that S. 3310 would *not* cut back the six year period then applicable to offenses involving defrauding the government, and no one disputed this. It was their opinion that the bill would simply establish a new five year *minimum* limitation period for all offenses. Hearings of April 21, 1954, Committee on the Judiciary, 83rd Cong., 2d Sess., p. 5.

Some two months later, when the Internal Revenue Code of 1954 was before the Senate, Senator Williams offered Section 201, Miscellaneous Title, as an amendment. He expressly stated that the amendment embodied the same features as S. 3310, *supra*, raising the statute of limitations to five years for *all* offenses. 100 Cong. Rec. pp. 9490-9491. The amendment was accepted and went to conference. There it was changed so as to delete that portion amending the general statute of limitations. The net result is that Congress intended to and did raise the statute of limitations from three to five years for some offenses by revenue officials and agents, but did not reduce the six year period for those offenses previously so governed.

Moreover, as mentioned above, petitioner did not raise the issue of the statute of limitations until he petitioned the Court of Appeals for rehearing. We urge that the Court of Appeals was correct in saying that the claim of error came too late. Although there is little authority on the question, what authority there is supports the court below, *United States* v. *Franklin*, 188 F. 2d 182, 186 (C.A. 7); *Pruett* v. *United States*, 3 F. 2d 353, 354 (C.A. 9), and we have not found any cases to the contrary. The fact that petitioner may raise the defense of limitations under a general plea of not guilty, *United States* v. *Barber*,

219 U.S. 72, 78; *United States* v. *Kissel*, 218 U.S. 601, 610, does not mean that he cannot also waive the defense. The cases relied upon by the dissent below for the proposition that the government must show that the offense was prosecuted in time are cases where either the objection was raised at trial (*United States* v. *Schneiderman*, 106 F. Supp. 892 (S.D. Cal.)) or the report is silent as to that (*Az Din* v. *United States*, 232 F. 2d 283 (C.A. 9)).[7]

CONCLUSION

The decision below is correct, for the reasons discussed above. The issues raised by petitioner have no general significance since they are either limited to the facts of this case or relate to prior statutes no longer in effect. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

[7] Although petitioner asserts that he has been denied due process and subjected to "double jeopardy doubled" (Pet. 13) as a result of several indictments being brought against him, he does not claim that the defense of double jeopardy was available to him in his second trial for a separate offense. Cf. *Wade* v. *Hunter*, 336 U.S. 684, 688-690. The quashing of a bad indictment is no bar to a prosecution upon a good one. *United States* v. *Oppenheimer*, 242 U.S. 85, 87; *United States* v. *Narvaez-Granillo*, 119 F. Supp. 556, 559 (S.D. Cal.).

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